N

HOME RULE

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AMERICAN HOME RULE.

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A Sketch of

THE POLITICAL SYSTEM

IN THE

UNITED STATES

BY

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BARRISTER-AT-LAW.

EDINBURGH

ADAM AND CHARLES BLACK

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Inscribed

TO

THE AUTHOR'S CONSTITUENTS,

THE PARLIAMENTARY ELECTORS

OF

THE BURGH OF DUNDEE.

INTRODUCTORY.

THE main object of the following pages is to exhibit, for the information of British readers, the manner in which the American people have solved the problem of Home Rule, which at this moment weighs so heavily on our political life. It is not pretended that the conditions in both countries are the same, or that the scheme which has been adopted in the one can be applied successfully in the other. But the problem is essentially the same in both cases, viz., to reconcile self-government in local affairs with national control in national affairs; and the conditions are sufficiently similar to justify us in looking to the American model for matter of instruction, if not of guidance, in our own difficulties. A State in the American Union has not the national characteristics of Scotland or Wales, to say nothing of Ireland; but each State has, at all events, a provincial character of its own and special interests of its own, which override the differences between its own internal subdivisions, and mark it off as a separate community from other States. How to arrange the constitutional

system so that each such community shall govern itself, and yet leave the nation master of national affairs, is a problem which in America has been successfully solved.

The process of solution has been, in one important respect, the reverse of that which appears to lie before us. The American people had to build up a National Government out of the separate State Governments. We have to create a State Government or Governments out of the National Government. The one condition on which all parties in the Home Rule controversy profess to be agreed is, that the sovereignty of the National Government shall not be impaired. The corresponding condition in the American question was that the sovereignty of the component States should not be destroyed or absorbed in the Government of the Union. The Union exists through the surrender by the States of part of their sovereign powers: a Home Rule Government, as generally conceived, would exist by the delegation of authority from the National Government. These differences being kept in view, there may be some profit in considering the line of demarcation which separates in America the province of the National from that of the State Government, and the machinery by which each power is enabled to exercise, but not permitted to exceed, its own proper functions.

It is proposed, accordingly, to sketch in outline the constitutional system—State and Federal—of the United States, with special reference to the powers

and methods of the Legislatures ; then to examine the relations between the Federal or National Government and the State Governments, regarded as a system of Home Rule ; and, incidentally, to notice some characteristics and practices of American politics more or less directly connected with this point of view.

The authorities most frequently referred to in the following pages are—

A Treatise on the Constitutional Limitations which rest upon the Legislative Power of the States of the American Union. By Thomas M. Cooley, LL.D. Fifth edition. Boston, 1883.

The General Principles of Constitutional Law in the United States of America. By Thomas M. Cooley, LL.D. Boston, 1880.

Congressional Government : a Study in American Politics. By Woodrow Wilson. Third edition. Boston, 1885.

HOME RULE.

CHAPTER I.

GENERAL VIEW OF THE CONSTITUTIONAL SYSTEM.

THE first glance at the United States reveals a political system remarkably unlike our own. It is not merely that the one is a republic and the other a monarchy; there are far more important points of difference than that. Those which may be described as most immediately obvious are, first, the total separation in the United States of imperial or national from provincial or local authorities—of what is called the *Federal* power from the *State* power; secondly, the strict separation of each of the three departments—legislative, executive, and judicial—from and its independence of the others; and thirdly (a consequence of the other two), the absence of any single determinate sovereign body or assembly, or of any real sovereign other than the people themselves.

In this country, no doubt, we have something of the same sort as the first two characteristics mentioned. We do not confuse local and imperial business: we do

not combine legislative or executive with judicial functions. We have county government of a sort and town government of a good sort, as distinguished from the general or Imperial Government. The Court of Session and the House of Commons are distinct bodies, and the Speaker of the House has wholly different duties from the Chancellor of the Exchequer. But the existence in this country of an omnipotent Parliament overrides all these distinctions. Throughout the whole British Empire there is one determinate body whose word is constitutionally supreme. That body is Parliament, meaning thereby, in theory, the Crown, Lords, and Commons, and in actual practice and fact, for most things, the House of Commons alone. Parliament habitually abstains from interference in large portions of this Empire; it leaves many of the Colonies to govern themselves; it leaves India to the Governor-General and his clerks. But wherever and whenever it speaks, its word is law. The self-government of our municipalities is a gift from Parliament. The wisdom of the judge is but the breath of Parliament. The Ministry which carries on the imperial business of the country exists but by the favour of Parliament. In the United States there is no such sovereign assembly or combination of assemblies. The President and the two Houses of Congress have no such sovereign power as the Queen, Lords, and Commons. The Government of the United States is confronted in every single State with the Government of that State. Each has its own province, and within that province is independent of the

other and excludes the other. And in the government of the United States itself the two Houses of Congress have their own functions, and can control neither the executive nor the judges beyond the limits of the constitution. The President and his Cabinet are not at their mercy, as a British Ministry is at the mercy of the House of Commons. The judges of the United States are not compelled to accept the legislation of Congress as law; on the contrary, if such legislation is beyond the powers of the legislative body, the Supreme Court will declare it null and void, as the Supreme Courts here will annul and disallow an unauthorised bye-law of a railway company or a local corporation.

The nearest parallel in this country to the American system is the constitutional system prevailing in the Universities of Oxford and Cambridge. There you have a university with its colleges, but the university and the college has each its own functions and its own officers. The university is not co-extensive with the aggregate of colleges, because it includes halls which are not colleges, and individuals who do not own allegiance to hall or college. The colleges create the ruling power in the university, but they are not subject to it except in special matters. So the United States, as a political system, includes not only the States which create the governing powers, but Territories which are not States, and Districts which are neither States nor Territories. There are thirty-eight States, eight Territories, and two Districts, if the recently acquired

Alaska may be so described. The District of Columbia, on which the capital city of Washington is built, is governed directly by Congress. The Territories, which may be described as States in process of formation, have legislatures of their own, and practically full local self-government,—by delegation, however, from the United States as a whole.

The real units of the system are the separate States. They create the governing authorities of the United States. The Territories do not vote in a presidential election, and do not send senators or members to Congress. The thirty-eight States, by various methods of election, evolve the Federal Government. That Government, although on a larger scale, is organised on the same general plan as the Governments of the separate States. In the Federal Government you have the President and his executive, the two Houses of Congress, and the judges. In the State Government you have a presiding officer, known in different States by different names, generally as Governor, the two Houses of the Legislature, and the judiciary. In the Federal Government you have the Constitution of the United States and its amendments; in the State, you have the State Constitution, defining in each case, with more or less minuteness of detail, the powers and provinces of the different authorities. The large Central Government is thus a copy of the small State Government, and the resemblance is carried down to minor details. Thus the Upper House or Senate is distinguished by a longer term of office than the

Lower; the President or Governor has a veto on legislation; the judges are distributed into a Supreme Court, which sits mainly for appeals, and judges of first instance, each of whom has a circuit or district of his own. The courts decide whether legislation is valid, and so on.

It would not be historically correct to say that the State Government is a copy of the Federal Government, because in a sense there were State Governments before there was a Federal Government. It is impossible for a British observer, however, to miss the parallel that State and Federal Government alike presents to the British constitution as it was a hundred years ago, and as it pretends under palpable disguises still to be. A hundred years ago we had a very different distribution of political power, although we still use the same names that were used then. There was more reality in the power of the Crown in those days, and the Upper House of Parliament was of more importance in the state than it is to-day. The founders of the American Republic revolted from the British crown, but not from the principles of the British constitution. So far as their materials and circumstances enabled them, they reproduced the regulations and safeguards, the checks and balances, that were believed to be the special virtue of that constitution. Instead of a hereditary monarch, they had an elective President; instead of a House of Peers, they had an elective Upper House. They adopted the essentials of the British system as it then existed, but in doing

so they inevitably introduced a condition which was wholly new, and to which the difference in the development of the two systems is largely due: they had to commit their constitution to writing. It was a treaty of union for one thing; but what is perhaps more important, it was a new creation. The British constitution, for the most part, exists only in practice and text-books of more or less authority, and in the course of a century it has grown to be a very different thing from the constitution as known to the American colonists. The great feature of that growth has been the overwhelming predominance of the Lower House, before which the separate powers of the Crown and the House of Lords have alike gone down. If there has been any change in the American Constitution it has been in a different direction. The executive in some respects is stronger,* and the Senate is stronger, than they were in the beginning. What we have had of a written constitution has never acquired any special sanctity. The treaty between England and Scotland, and the treaty between Great Britain and Ireland, couched as they are in the language of perpetual validity, have lapsed into the status of ordinary statutes. The Imperial Parliament which was created by them would certainly not scruple to deal with them as it pleased, and nobody, I should imagine, doubts its competence to do so.

The United States, then, is not only a Republic,

* The early Presidents were denied precedence by the Governor of New York.

but is a combination or federation of republics. The "republican form of government," as it is called, is guaranteed to all the constituent parts of the system, and to the system as a whole. Let us examine the larger Republic, which includes and rests upon the rest. We may notice briefly the following points:—

1. THE CONSTITUTION of the United States, the charter of this body politic—the Leviathan, as it may be termed. In that document the powers of the United States and its officers must be sought. It is, for its size, perhaps the most important political paper ever penned. It covers only a few printed pages, and numbers, with its amendments, only a few sections. The Constitution defines the province of this Federal Republic; it takes away from the small republics what it gives to the larger one. Certain subjects are defined in a broad and sweeping way as the domain of the Federal power. With these and no others it may deal; over these it is supreme; and the Constitution provides the appropriate machinery—legislative, judicial, and executive—for dealing with them.

Short as it is, it has in the course of a century acquired large accretions by judicial interpretation, so that a treatise would be required to expound some of its clauses.

By the theory of the Constitution the Union is a limited republic. The Constitution imposes limitations on the separate States also, as we shall see; but the implication is that the separate States contain the reserve of political power. Whatever is not expressly

taken from them by the Constitution of the United States they retain. They do not hold their existence by delegation from the larger Republic. Even when the Constitution authorises the Republic to make laws on special matters, the State may legislate in default of the Republic. If the Republic chooses to legislate, the State's powers are at an end; but until the Republic acts, the State powers are in full force and effect.

Out of this division of functions flows the source of party government in the United States. The Republican party magnifies the Leviathan's share; the Democratic party stands up for the reserved rights of the separate States. If party government be a blessing, the United States was fortunate in having in the circumstances of its birth material for the creation of an ideally suitable controversy, broad, indefinite, elastic, touching material interests at innumerable points, yet rising to the possibility of conceptions worthy of a great and free people.

It might be thought that, as the Republic derived its existence from the voluntary union of sovereign States, the controversy would inevitably be concluded in favour of the States-right theory, even to the extent of the right of secession, which was claimed by the Southern States twenty-five years ago. We know that the controversy was settled in precisely the contrary way; but it may be remarked here that the argument from the origin of the Union was weakened by the fact that in later times States were admitted on equal terms that

never had an independent sovereign existence apart from the Union. Louisiana, for example, was purchased by the United States from France. One of the subtlest controversies in the history of the Union was whether Louisiana had as good a right to secede as Virginia, which was one of the original States.*

The result, so far as ordinary laws are concerned, is a separate system in each State and Territory. The United States laws are, of course, uniform; you carry them with you wherever you go, but in every State you enter you find yourself under the dominion of a new set of laws. It is the State law which governs the ordinary transactions of life—the common relations of man to man; and each State has its own way of dealing with them. "New States, new laws," is one of the first lessons the Briton in America has to learn.

Finally, the Constitution may be amended, but not without much difficulty. Two-thirds of both Houses of Congress, or the legislatures of two-thirds of the States, may take the initiative; and the amendment, whether framed by Congress or by a Convention, must be ratified by the votes of three-fourths of the States after the manner appointed by Congress. In this one small cell resides the possibility of revolutionary changes being effected in the American Constitution by legal means.† The direct amendments, as might

* In an interesting but not impartial account of the debates in the Senate in J. G. Blaine's "Twenty Years of Congress," p. 251.

† *Art.* 5. — The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to

be expected, have been few. The Constitution has been changed more by development and interpretation than by positive and open alteration.

2. THE PRESIDENT.—A recent American writer describes the President as wielding powers which have been unknown in this country since the English people cut off the head of Charles I. The statement is not an exaggeration. The President of the United States is one of the most striking figures in the phenomena of government. Neither king nor premier in any free country is to be compared to him, although he unites the functions of both. In office his powers are vast; out of office he returns to the obscurity from which the voice of the people had called him. To-day he can by his mere word quash the legislation of a Congress which represents nearly sixty millions of men; he wields the patronage of ninety thousand public offices; he is the chief of the nation in war as in peace; he shapes, if he does not dictate, the foreign policy of the country, and pardons those whom the

this Constitution, or, on the application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing amendments, which, in either case, shall be valid to all intents and purposes as part of this Constitution when ratified by the Legislatures of three-fourths of the several States, or by Conventions or three-fourths thereof, as one or the other mode of ratification may be proposed by the Congress. Provided that no amendment that may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article, and that no State without its consent shall be deprived of its equal suffrage in the Senate.

laws have condemned, all without question or control, save the last remedy of impeachment. To-morrow he will have an advertisement in the newspapers soliciting the patronage of the public in the business or profession to which he belongs.

The manner of a President's election deserves special consideration. Everybody knows the overwhelming importance of the presidential election. Occurring at regular intervals of four years, requiring long months of preparation and canvassing; involving not merely the choice of the nation's chief, but the control by one or other party of national affairs for four years to come, it corresponds to a general parliamentary election in this country, and equally disturbs the ordinary business pursuits of the people. What is called the presidential election is legally only the election of delegates charged with the election of a President and a Vice-President. The delegates are free, under unimportant restrictions, to name whom they please, and it was undoubtedly the intention and belief of the framers of the constitution that they should exercise a free choice—that they should stand, in this one matter, between the people and its elective head, as a Parliament or a Congress stands between the people and its legislative decrees. But no delegate for a moment dreams of voting for any but the candidate selected by his party, and no citizen votes for a delegate on his own merits, or otherwise than as an instrument for carrying into effect the choice of the party, made and published many months before the election.

The Vice-President, elected at the same time and by the same delegates as the President, is a person of much less political importance. He is *ex officio* chairman of the Senate, with a casting-vote only, and he succeeds to the President's office if it should become vacant during the term of four years.

3. THE LEGISLATURE.—The legislative power of the United States is by the Constitution vested in a Congress consisting of two chambers—the Senate and the House of Representatives. Reserving for another chapter the organisation, methods, and characteristics of these bodies, we may quote here the language in which the Constitution defines their powers:—

Art. 1, *Sect.* 8.—The Congress shall have power—

To levy and collect taxes, duties, imports, and excises; to pay the debts, and provide for the common defence and general welfare of the United States; but all duties, imports, and excises shall be uniform throughout the United States.

To borrow money on the credit of the United States.

To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

To establish an uniform rule of naturalisation, and uniform laws on the subject of bankruptcy throughout the United States.

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures.

To provide for the punishment of counterfeiting the securities and current coin of the United States.

To establish post-offices and post-roads.

To promote the progress of science and useful arts

by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

To constitute tribunals inferior to the Supreme Court.

To define and punish piracies and felonies committed on the high seas, and offences against the law of nations.

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years.

To provide and maintain a navy.

To make rules for the government and regulation of the land and naval forces.

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.

To provide for organising, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress.

To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State on which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Govern-

ment of the United States, or in any department or officer thereof.

The following limitations on the powers granted to Congress are enacted by section 9:—

The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year 1808, but a tax or duty may be imposed on such importation not exceeding ten dollars for each person.

The privilege of the writ of Habeas Corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.

No bill of attainder or *ex post facto* law shall be passed.

No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

No tax or duty shall be laid on articles exported from any State.

No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another, nor shall vessels bound to or from the ports of one State be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the treasury but in consequence of appropriations made by law, and a regular statement and account of the receipts and expenditure of all public money shall be published from time to time.

No title of nobility shall be granted by the United States, and no person holding any office of profit or trust under them shall, without the consent of Congress, accept of any present, emolument, office, or title of any kind whatever from any king, prince, or foreign state.

Additional limitations are contained in the first ten amendments of the Constitution :—

Art. 1. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and petition the Government for a redress of grievances.

Art. 2. A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

Art. 3. No soldiers shall in time of peace be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law.

Art. 4. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Art. 5. No person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law ; nor shall private property be taken for public use without just compensation.

Art. 6. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have

been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence.

Art. 7. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

Art. 8. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unjust punishments inflicted.

Art. 9. The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Art. 10. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

The foregoing are the main clauses which directly define or limit the legislative powers of the Congress, but in the other clauses of the Constitution there are provisions which have an enabling or restrictive effect on the legislature. The most important, perhaps, for our present purpose is the second paragraph of the 3rd section of Article IV.: "The Congress shall have power to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States; and nothing in this Constitution shall be construed so as to prejudice any claims of the United States, or of any particular State." It is on this clause that the poli-

tical system of the Territories depends, and it will be observed that the right of Congress to legislate for the Territories is of a strictly proprietary character, like its right to deal with the personal property belonging to the United States.

The relation of Congress to the President is a good example of the interlocking vetoes, as they may be called, which abound in the system. The President may veto a bill passed by both Houses; but if, on reconsideration, the bill is again passed by a majority of two-thirds in each House, the veto falls to the ground and the bill becomes law. Both Houses operate powerfully on the executive through their control of finance, while the Senate has two special functions of vast importance—in its control of nominations to public offices and its veto on treaties. The President's initiative is balanced by the power of the Senate to refuse ratification, but the Senate cannot itself initiate or compel action.

4. THE FEDERAL JUDICIARY may be said, in one sense, to be the supreme power in the State, because it has the power of declaring the acts of either the legislature or the executive to be *ultra vires* and void; but this unique authority is balanced by the influence of the President and the executive in the constitution of the courts. The part played by the Federal courts in maintaining the balance between State and Federal powers—the Home Rule system of the United States—will be noticed subsequently. Here it will be sufficient to mark the broad constitu-

tional distinction which separates the Supreme Court from all subordinate tribunals in the Federal judiciary. The Supreme Court is created directly by the constitution, and its jurisdiction is defined by the constitution, and neither President nor Congress can terminate its existence or destroy its powers. The local and subordinate tribunals are (under powers granted by the constitution) created by Act of Congress, and Congress may at any moment sweep them away by new legislation, or limit their activity by withdrawing particular classes of subjects from their jurisdiction. On one occasion (in 1802), Congress being dissatisfied with the conduct of the inferior courts, did for the time being put an end to them.

Such in all its branches is the "Government of the United States." The smaller Governments of the individual States are organised on the same general model, and are, no doubt, influenced in their methods of procedure by the practice of the Federal Government. Their respective agencies—executive, judicial, and legislative—meet and touch each other at many points; but it is in and through the Legislatures that the chances of collision between the National and the State power are most likely to arise. It is in the region of the Legislatures, also, that the chief difficulties of our own question of Home Rule are supposed to reside. We proceed to examine the Legislatures of the United States, including the Legislatures of the States, but dealing more particularly with the Congress of the Union.

CHAPTER II.

THE LEGISLATURES—CONGRESS.

THERE are three distinct kinds of legislatures in the United States—the National Legislature, sitting at Washington; the State Legislatures, sitting in the capital cities of the several States; and the Territorial Legislatures, sitting in the capitals of the Territories. As contrasted with our own Legislature, these are all limited in power; not one of them is like the British Parliament—omnipotent. Congress, as we have seen, is limited by the provisions of the Federal constitution. A State Legislature is limited in one direction by that constitution, and in another by the constitution of the State to which it belongs. A Territorial Legislature is not only limited by the organic law under which it exists, but may by a change in that organic law lose such power as it possesses or cease altogether to exist. Practical freedom it no doubt possesses, but in theory, which may at any moment be realised in fact, the Territorial Legislature is entirely dependent on the Congress of the United States. The laws of every one of these Legislatures are liable

to be declared void by external tribunals in any proper case of which such tribunals have jurisdiction. All of these Legislatures are limited also by the power of the executive—by the veto of a President or Governor, whom they do not appoint and whom they cannot dismiss.

The theory underlying all these limitations is, that sovereign power belongs only to the people. By the people is meant, in national affairs, the whole of the inhabitants of the States; in State affairs, the whole of the inhabitants of the State. The people is a *roi faineant*, difficult to set in motion in the State, almost immovable in the nation as a whole. But the Legislature is always its subordinate agent, holding only what power may be delegated to it; and the constitution, in nation or State, exists to define that power.

The external form of all the Legislatures, National, State, and Territorial, is the same. The bicameral system prevails throughout. There is an Upper House or Senate; a Lower House or Assembly, with co-ordinate powers in general legislation, and certain specific powers peculiar to each. The Senate is the smaller in point of numbers, and the more permanent in tenure. The executive veto, to which all are subject, is always supersedible by the two-thirds majority, except in the case of some of the Territories.

The type may be best studied in the great Federal Legislature, although the composition of that Legislature is in some respects peculiar. Many of its

peculiarities relate back to the circumstances of its origin. The Union had to be created out of thirteen sovereign States, of varying degrees of wealth, population, and importance. All sovereigns are equal, and the Union had to make a show of preserving that equality. But some States were greater and weightier than others, and that fact too had to be recognised. The structure of the Legislature, and indeed the whole scheme of the constitution, endeavours to reconcile these opposing principles in a highly ingenious manner. Down to the minutest details we find the sovereignty of the State and the sovereignty of the nation alternately asserted and modified.

THE SENATE, consisting of two senators from each State, whether large or small, new or old, represents the principle of equality, which is the badge of State sovereignty. Indeed this formal equality of the Senate might be described as the last relic of the independent sovereignty of the States. THE LOWER HOUSE, the House of Representatives, on the other hand, has its membership apportioned directly according to population. There is a periodical revision of its membership after every census. Congress decides what the total number of representatives shall be; and to each State it awards the number of representatives to which its population, in due proportion, is entitled.

The structure of the Senate will strike an Englishman more forcibly even than an American as a remarkable violation of representative principles, as understood in these democratic days. The Senate

of the United States is, for its size, the most influential political assembly in the world. In no other assembly is the political power of each individual member so great. Yet a state like Nevada, with a population no larger than that of many an English county, has exactly the same number of votes as the great State of New York, which in wealth, population, and resources may rank with a European nation. The contrast is rendered still more striking when we consider the case of a Territory demanding admission into the Union as a State. When such a Territory—Washington, Montana, Dakota, or any other—seeks admission, New York and Pennsylvania are called upon to reckon a thousand Western settlers as equivalent to tens of thousands of their own people. In one of the Territories just mentioned, Dakota, the people not only want admission to the Union, but demand to be admitted as *two* States; so that in this case, so far as the Senate is concerned, New York is called upon to give twice its own share of power to a community which is out of all comparison with it in importance, and at present possesses no political power whatever.

While Congress determines the number of representatives to be allowed to each State, it leaves to the State the local distribution of that representation. The fourteenth amendment to the constitution provides that representatives shall be apportioned among the several States according to their respective numbers; but when the right to vote in Presidential, Con-

gressional, or State elections is denied to any of the male inhabitants, being of full age, and citizens of the United States, or in any way abridged, the basis of representation shall be proportionately reduced. Each State, however small, has one member of the House of Representatives. Congress has required that each State shall be divided into districts of contiguous territory, and equal as nearly as may be in numbers; but the division of the State into districts is left to the State Legislature. In the arrangement of the districts there is room for a great deal of manipulation designed to promote party purposes, and known as "gerrymandering." "Thus the noted 'shoe-string' district of Mississippi is 500 miles long and about 110 miles broad: it contains no considerable town save Vicksburg, and is almost wholy rural. Another instance is the 'dumb-bell' district of Pennsylvania, which resembles the shape of that object." * A district in South Carolina is divided at high water into two separate territories and the principle of "contiguity" is only maintained at low water. Where an additional member is allotted to a State, and the Legislature fails to make a new districting, the additional member is voted for by the whole State, and is termed a Congress-man at large.

The LOWER HOUSE is thus intended to be directly and proportionately representative of the whole people. The Senate is constituted on a wholly different principle. Senators are elected, not by the people of the

* Ford's "American Citizen's Manual."

State, but by the State Legislatures. The election of a senator is often the most important business of a session, and the most exciting issue at the antecedent State elections. If a majority of each House of the State Legislature agrees on the same candidate, the matter is settled; but if this result is not attained, both Houses assemble in "joint session," and vote for candidates until a majority is obtained. Day after day fruitless votes may be taken, and in the end the Legislature may have to adjourn without any candidate receiving a majority vote. Occasionally it happens that a public man acquires so great a predominance in his own party, that members of the State Legislature are returned as much to vote his election to the United States Senate as for any other question. Where members are not so bound, the election is not free from embarrassments, even if one of the two parties has a decided majority.

Senators hold office for six years or three Congresses, and representatives for two years only, equivalent to one Congress. But one-third of the Senate is elected every second year. The Senate as a body is permanent, but its composition changes to the extent of one-third at every biennial election. The President, the Senate, and the House of Representatives are thus bound together by no necessary community of political complexion. The President may be a Democrat while both Houses may be Republican, or one House may be Republican and the other Democratic. Between the Government as a whole and the prevailing public

opinion of the moment there is not that close connection which the conventions of our system tend to bring about. The virtual supremacy of the House of Commons, together with its liability to dissolution at any moment, not only ensure agreement between the Ministry and the majority, but render both highly sensitive to the apparent tendency of public opinion. The absence of this responsiveness between the Government and the people is one of the most important of the practical differences which distinguish the American system from our own. . . . . .

There are two other points of some interest and importance in the constitution of Congress. Members of both Houses are paid, the senator, as becomes his superior dignity, receiving the larger salary; and both senators and representatives must belong to the State which they represent, that is, they must be inhabitants thereof at the time of their election. The payment of members, both in the State and in the Federal Legislature, is an absolute necessity of political life in America. There is as yet no large class of men of means and leisure, such as we have been accustomed to rely on for active political work, and no national centre for such a class even if it existed. Nor does a Congressional career offer the same prizes as Parliamentary life does. The local lawyer who comes up to Washington to represent his State or district takes naturally to practice in the Supreme Court, and may expect at all events to get hold of the business coming from his own part of the country.

For other members there is in general no compensation and no inducement beyond the salary. Without payment, the smaller and more remote States could not provide an adequate representation at Washington. It may be added that there appears to be no ground for believing that payment of members lowers the quality of the representatives.

So much cannot be said for the other provision that members must be selected from the inhabitants of the State. The career of a public man is thereby limited within State boundaries. A statesman rejected by one constituency has no chance of appealing to another. Such a series of changes as we have seen in the Parliamentary career of Mr. Gladstone or Mr. Goschen would be impossible in America. No public man, however eminent, can look forward to the probability of an unbroken or a lengthened Congressional career. The Congressman is at the mercy of his own party caucus; the senator is at the mercy of the State Legislature, unless he is important enough to make his election an issue at the State election. In this country a public man of any position may acquire a direct hold over his electors which no "machine" could safely disregard, and a public man of high eminence may be said to have the whole country for a constituency. The most eminent politician in the United States, the leader, if there is one, of the regular Republican party, who came near being President in 1884, and may be President in 1888, is, and has been for some time, without a seat in Congress.

This discontinuousness of political life in America, coupled with the conditions under which Congress carries on its work, tends to prevent the growth of a class of great Parliamentarians, such as we have never been without. The "professional politician" abounds, but he is a totally different kind of person. He is never out of politics, but it does not follow that he should ever be in the Legislature, or even in office. His business is to control the elections by which these places are filled. It is unfortunate that he should be the most conspicuous type of perseverance in political pursuits in the United States.

To turn from the structure of the Legislature to its methods, we have to remark, in the first place, the absence of the guidance of an official Ministerial group. With us, both Houses depend absolutely on the lead of the Ministry for the time being, and the chief of the Ministerial group is the leader of the House. In America, the Ministry, in the State as well as in the National Government, is an external body to the Legislature. Its members are not, and cannot be, members of either House. With us, the Ministry are at once the servants and the masters of the House of Commons. Their existence depends on the support of a majority, but while they exist they are charged with the initiative and active control of the operations of the House. In Congress each House is its own master, and organises itself, the House of Representatives under the Speaker, an officer of vast power and importance; the Senate, under the Vice-Presi-

dent of the United States, a personage of much inferior influence. The difference in numbers of the two Houses necessitates different modes of doing business. The Senate is a chamber of seventy-six members, and the House at present numbers 325. The Senate is the more leisurely, the more orderly, and the more dignified body, being in these respects as much superior to the House of Representatives as the House of Lords is, with more or less reason, alleged to be to the House of Commons. The House of Representatives, as becomes the more popular branch, is more hurried and tumultuous in its conduct of business, and more under the necessity of subjecting itself to stringent rules of procedure. Thus in the House of Representatives the previous question, which sweeps away all amendments and stops all debate, is in constant operation, but no such closure has been necessary in the Senate.

The methods of legislature are best seen perhaps in the larger body. The House of Representatives, although much larger than the Senate, is yet less than half the size of the House of Commons. The number of 325 members would seem to us admirably adapted for thorough yet not excessive debate; and if the House of Commons were reduced to that number much of the necessity for closure rules would pass away. The most remarkable thing about the American House is that it does not appear to be a debating chamber at all. A recent writer speaks of "the entire absence of the instinct of debate" among its members, and

"their apparent unfamiliarity with the idea of combating a proposition by argument."* One reason for this state of things is to be found in the physical conditions under which the proceedings of the House are carried on. Members are scattered over a large chamber, where "each member has a roomy desk and an easy revolving chair, where broad aisles spread and stretch themselves, where ample soft-carpeted areas lie about the spacious desks of the Speaker and clerks, where deep galleries reach back from the outer limits of the wide passages that lie beyond the bar,—an immense spacious chamber, disposing its giant dimensions freely beneath the great level lacunar ceiling, through whose glass panels the full light of day pours in." † In such a chamber it must be a matter of extreme difficulty to gain the ear of the House, and the successful and stentorian orator who accomplishes that feat is said to draw about him a crowd of curious listeners from all parts of the House, much as such an orator might collect a knot of hearers at an open-air meeting. "Let the reader," says a writer in the *Century*,‡ "go and sit for a time in the gallery of the House of Representatives and watch that national bear-garden; let him enjoy the usual scene—one purple-faced representative sawing the air in the progress of what is technically called 'an oration,' a dozen or more highly amused colleagues surrounding him, and the rest of the members talking

* Woodrow Wilson's "Congressional Government," p. 79.
† Wilson, p. 86. ‡ November 1886.

at the top of their voices, clapping their hands for pages, writing, reading, telling funny stories, and laughing uproariously at them, making social calls from desk to desk, doing anything and everything except the business for which they are paid."

This strange Parliamentary habit might doubtless be altered considerably if the representatives were crowded into a chamber like the British House, which is small enough even for conversational discussion; but a more serious difficulty lies in the rules and methods of procedure which govern the course of business, and the most serious of these is the wholesale devolution of power and responsibility on standing committees. There are some forty-seven or forty-eight standing committees in the House of Representatives, to one or other of which all bills are referred. "Besides the great Committee of Ways and Means, and the equally great Committee on Appropriations, there are standing committees on Bank and Currency, on Claims, on Commerce, on the Public Lands, on Post-offices and Railroads, on the Judiciary, on Public Expenditure, on Manufactures, on Agriculture, on Military Affairs, on Mines and Mining, on Education and Labour, on Patents, and on a score of other branches of legislative concern." * The number of these committees is constantly increasing. The first and second readings of a bill are mere formalities; the only occasion for dispute arises on the question to which committee a particular bill is to be

* Wilson, p. 68.

referred, for on that reference the fate of the bill generally depends. The third reading would appear to be, so far as the House is concerned, as purely formal an affair as the first and second. "There is one principle which runs through every stage of the procedure, and which is never disallowed or abrogated —the principle that the committee shall rule without let or hindrance." * The House parts with its power to small groups of its own members.

But the excessive extension given to the principle of devolution is not the most remarkable thing in this remarkable system. The procedure by committees offends our Parliamentary sense by the despotism and the secrecy of their arrangements. These *quæstiones* are not even elected by the House in its collective capacity; they are nominated by the Speaker. And the committees themselves have not the power of electing their own chairman; they, too, are appointed by the Speaker. Within the committee the chairman appears to be a sort of constitutional despot, for it is he who selects the business to be laid before his committee; on that selection the fate of most bills necessarily depends. The number of legislative proposals is so large that only a small percentage of them can be overtaken, and the chairman of a committee can kill a bill by the simple expedient of keeping it out of the way. The "massacre of the innocents," which in England marks the close of a session, is going on all the year round, and it is massacre by

* Wilson, p. 74.

suffocation. Then the proceedings of the committee are secret. "It is not usual for the committees to open their sittings often to those who desire to be heard with regard to pending questions; on the contrary, they are privileged and accustomed to hold their sessions in absolute secrecy." Occasionally, however, a committee will hear arguments on the matter before them, whether from their colleagues of the House or from outsiders interested in the question. To these remarkable characteristics is to be added the fact that the committee is permitted to control the time during which its report on bills referred to it is under consideration by the House. The procedure in this respect is so characteristic of the American Parliamentary system, that we shall quote Mr. Wilson's account of it. "It is the established custom of the House to accord the floor for one hour to the member of the reporting committee who has charge of the business under consideration, and that hour is made the chief hour of debate. The reporting committee-man seldom, if ever, uses the whole hour himself for his opening remarks; he uses part of it, and retains control of the rest of it; for by undisputed privilege it is his to dispose of, whether he himself be upon the floor or not. *No amendment is in order during that hour*, unless he consents to its presentation. And he does not, of course, yield his time indiscriminately to any one who wishes to speak. He gives way, indeed, as in fairness he should, to opponents as well as to friends of the measure under

his charge; but generally no one is accorded a share of his time who has not obtained his previous promise of the floor, and those who do speak must not run beyond the number of minutes he has agreed to allow them. He keeps the course, both of debate and of amendment, thus carefully under his own supervision as a good tactician, and before he finally yields the floor, at the expiration of his hour, *he is sure to move the previous question.* To neglect to do so would be to lose all control of the business in hand; for unless the previous question is ordered, the debate may run on at will, and his committee's chance of getting its measure through slip quite away, and that would be nothing less than his disgrace. He would be all the more blameworthy because he had but to ask for the previous question to get it. The previous question once ordered, all amendments are precluded, and one hour remains for the summing-up of the same privileged committee-man before the final vote is taken and disposed of."

These Parliamentary practices would not be intelligible without a statement of the amount of business which the American Congress is called upon to deal with. When we remember that it is free from all Home Rule business—all domestic legislation—the numbers are sufficiently startling. The following figures are taken from the *Century* article already referred to, and they relate to the first session of the forty-ninth Congress, which began on the 7th December 1885, and ended on the 5th August 1886 :—

Bills and joint resolutions introduced—		
In the House . .	10,228	
In the Senate . .	2,974	
		13,202
Bills passed—		
From the House .	746	
From the Senate .	241	
		987
Bills passed and vetoed—		
Private pensions bills .	102	
Bills for public buildings	6	
Other bills . .	7	
		115
Passed over the veto . . .		1
"Reports" made by committees—		
In the House . .	3,455	
In the Senate . .	1,610	
		5,065

Pages of the Congressional Record filled, 9,000.

These figures show a very great increase in the mass of business over previous sessions—an increase, moreover, which has been steadily going on for many years past. The compiler of these figures declares that, outside of one or two Acts, the mass of legislation consisted mainly of private legislation, interesting only to certain constituents of the more skilful members of Congress, and of such "public" legislation as Acts permitting the erection of bridges at specified points, and Acts for the erection of public buildings, interesting only to larger or smaller groups of other skilful or fortunate Congressmen.

The committee system, of which these are the

results, appears to deprive the House effectually of the conduct of its own affairs. Mr. Wilson declares that the chairmen of committees are the real leaders of the House, corresponding, as far as there is anything corresponding, to the Ministry in the English House of Commons; but he points out that there is no cohesion among them. On the contrary, they are composed of "selfish and warring elements; for chairman fights against chairman for use of the time of the Assembly, though the most part of them are inferior to the chairman of Ways and Means, and all are subordinate to the chairman of the Committee on Appropriations." The severity of the competition may be estimated from the statement of Senator Hoar, that in an ordinary Congress with two sessions, covering together a period of ten months, the average amount of time available for an ordinary committee in which to report upon, debate, and dispose of all the subjects of general legislation committed to its charge is not more than two hours.

Nothing but the most drastic kind of closure could enable such a system to work at all; but the excessive stringency of the rules of Congress is mitigated, it would seem, by an equally excessive leniency on special occasions. The close of a session is marked, not, as with us, by a massacre of the innocents, but by a wholesale suspension of the rules of the House. Senator Hoar is of opinion that the majority of the bills which get through are carried by means of a suspension of the rules. "On Mondays and during

the last ten days of the session, any member may move to suspend the rules and pass any proposed bill. It requires two-thirds of the members voting to adopt such a motion. Upon it no debate or amendment is in order. In this way if two-thirds of the body agree, a bill is, by a single vote, without discussion and without change, passed through all the necessary stages, and made a law so far as the House of Representatives can accomplish it; and in this mode hundreds of measures of vital importance receive, near the close of an exhausted session, without being debated, amended, printed, or understood, the constitutional assent of the representatives of the American people."

After such statements as these, one is not surprised that impatient Americans should declare, as the writer in the *Century* does, that the National Congress has become the most incapable legislative body in the constitutional world. Without accepting that verdict, we may point out some of the consequences which follow from the legislative methods which have been described. One of these is the disappearance of the habit of debate, already noticed, and which Mr. Wilson brings out with admirable clearness and force. Congress has ceased to be a great instrument of public discussion, and the popular House is less given to debating than the Senate. Neither House has that hold upon the public mind which is given to both Houses of Parliament by the system of open controversies and serious debate under the great

leaders of both or all political parties. No Englishman can fail to remark how small a space is given to the proceedings of Congress in the American newspapers. Among ourselves, in spite of the diurnal jeremiads on the decadence of Parliament from quarters which cannot be pronounced disinterested, there can be little doubt that public interest in Parliamentary proceedings has increased and not diminished in recent years. The copious reports in the great provincial newspapers are only a sign of this increasing attention of the public to the doings of the Legislature.* It was suggested in the House of Commons recently that people in America cared little about Congress, because they were absorbed in the proceedings of their Home Legislatures. But State Assemblies fare little better at the hands of the reporter than Congress does. The true explanation is, we suspect, that given by Mr. Wilson. He says nobody in America reads the Congressional reports, because they are not interesting. Americans who never trouble themselves about the "Congressional Record" eagerly read the reports of an English Parliamentary debate. A great speech by Mr. Gladstone or Mr. Bright will be printed next morning in the journals of the Pacific slope with a fulness of detail denied

* It is only fair to say, that the habit of strict reporting is generally less prevalent in America than it is in this country. The interviewer and the descriptive reporter have corrupted the historical faculty of the newspaper. Even in the report of a law case it is a rare thing to find a plain and exact account of what was said and done.

to American statesmen of corresponding position and authority. The "Congressional Record" itself is a testimony to the deterioration of Congress as a debating assemblage. The speeches which it contains have not necessarily been delivered. By permission of the House they may be taken as spoken, and duly printed and circulated. Some years ago it appears that even the consent of the House was not required, until the appearance of a poem among the debates created a scandal which had to be abated by a somewhat stricter rule.

Another point on which Mr. Wilson lays great stress is the absence of party conflict within the House. The disintegration of the House into committees destroys it as an arena for party warfare. The committees which shape the legislation of Congress are made up of members of both parties, and their recommendations are in each case the recommendations of the committee, and not merely of a majority therein. Consequently "very few of the measures which come before Congress are party measures. They are, at any rate, not brought in as party measures. They are endorsed by select bodies of members chosen with a view to constituting an impartial board of examination for the judicial and thorough consideration of each subject of legislation. No member of one of these committees is warranted in revealing any of the disagreements of the committee-room, or the proportions of the votes there taken; and no colour is meant to be given to the supposition that the

reports made are intended to advance any party interest. Indeed, only a very slight examination of the measures which originate with the committees is necessary to show that most of them are framed with a view to securing their easy passage by giving them as neutral and inoffensive a character as possible." The contrast between this cessation of party warfare in Congress and the state of war which is the state of nature in Parliament is too obvious to need pointing out. But it contrasts also with the extreme activity and the high organisation of party forces outside Congress. The party cleavage runs right down through all the degrees of government, National, State, Local, and Municipal, and the same election, and the same ballot-paper, as a rule, express the choice of the elector for Congressmen, for State legislators, for county clerks, and town-councillors. Neither in perfection of machinery nor in scope of action can English parties compare with American. The severity of party bonds may not be in all respects a blessing, but it must be regarded as one of the great "centripetal forces" of a system of Home Rule government. The curious thing is, that the spirit of party which has brought Congress together appears to fade away within the walls of Congress itself. According to Mr. Wilson, it is kept effectively alive by what he calls the "legislative caucus" or private meeting of members. The essence of a "caucus," as the word is often used in the United States, appears to be a secret conclave of persons constituting a section of some public body. They

meet in private to decide what their public action is to be, to compose their differences beforehand. The principle of the system is that the minority yields to the majority, so that the whole mass can move and act solidly when the crisis comes. They are to be found everywhere—in the State Legislatures, and in the Conventions of parties, as well as in Congress. They have their counterpart in those private combinations of shareholders which are formed for the purpose of obtaining control of a corporation. In Congress they are regarded by Mr. Wilson as an antidote to the disintegrating effect of the committee system. "It is designed to supply the cohesive principle which the multiplicity and mutual independence of the committees so powerfully tend to destroy. Having no Prime Minister to confer with about the policy of the Government, as they see members of Parliament doing, our Congressmen confer with each other in caucus." The sanction of the caucus is the force of party spirit outside the House. "The man who disobeys his party caucus is understood to disavow his party allegiance altogether, and to assume that dangerous neutrality which is so apt to degenerate into mere caprice. Any individual, or any minority of weak numbers or small influence, who has the temerity to neglect the decisions of the caucus is sure, if the offence be often repeated, or even once committed upon an important issue, to be read out of the party without chance of reinstatement."

Again, it is justly said that the committee system fosters the practice of "lobbying." A small group conducting its proceedings in private is necessarily more easily influenced by the professional promoters of bills than the public assembly could possibly be. The "lobby" appears to be an inseparable appendage of all American Legislatures. It combines the functions of the Parliamentary agent with others of a less legitimate character.* It is the least pleasant feature of the American system, and one which the admirers of the system as a whole may be excused for saying as little as possible about.

From the point of view of the reformer, it may be doubted whether a system apparently designed to facilitate legislative work does not impede progress in great matters. Great legislative movements have certainly been less common, and, one may presume, less necessary in the United States than in this country, but they are probably more difficult to carry through. The main difficulty in this country is to get the ear of the public, but that is always ready to listen to the great party leaders. But in the United States there are, as we have seen, no great party leaders, in our sense of the term. There is no momentum of public opinion telling for a particular measure, and operating directly upon the members of the Legislature. It would not be difficult to name important measures of reform the necessity of which has been long acknowledged,

* The absence of any distinction between public and private Bills is largely responsible for the existence of the "lobby."

which, session after session, are left to perish in the pigeon-holes of the committee-room.

So far we have been speaking of the House of Representatives, but even in the Senate the same practices largely prevail. It is not under the necessity of curbing its debates by a rigid system of closure, but it is equally subject to the rule of committees. In this assembly of seventy-six members there are no fewer than twenty-nine standing committees. These are not appointed by the President of the Senate, but are selected by ballot; and probably this method of election makes them all the more effectual in depriving the proceedings of the Senate of a party character. There is, at all events, the same absence of organised party conflict which has been noticed as a feature of the other House. There is more of the habit of debate, however, and the Senate has never tolerated any attempt to interfere with its power of discussion. Clay's closure policy in 1841, which sought to restrict the length of speeches, or at all events the duration of debate, met with a resistance so fierce that no subsequent attempt has ever been made to revive it. American writers appear to think that, in respect of this difference in procedure between the two Houses, the advantage is all on the side of the Senate. Senator Hoar goes so far as to say that the mechanism of the House of Representatives has resulted in destroying that equality with the Senate which belongs to it by the Constitution.

Whether the Senate be in reality the more powerful

of the two Houses, it is certainly, in contrast with the House of Lords, a real second chamber. "It can not only question and stay the judgment of the Commons, but may always with perfect safety act upon its own judgment, and gainsay the more popular chamber to the end of the longest chapter of the bitterest controversy. It is quite as free to act as is any other branch of the Government, and quite as sure to have its acts regarded."

Some special functions of the Senate have caused it to appear to many the predominant branch of the Government; as, for example, its right to control the treaty engagements contracted by the President, and its veto on official appointments. In respect of the former, it fulfils to some extent the functions of a Cabinet, but a Cabinet from which the Prime Minister is excluded. The Senate, acting as usual through a committee which sits *in camera*, deals as it pleases with the treaties submitted to it by the President, but the President has no formal or official means of communicating the reasons for his policy to the committee. And while the Senate can refuse to ratify, it cannot dictate or initiate a policy. Neither can act without the other, and the two cannot act together; and common action would seem to be brought about only by the fact that some action is necessary. The only power the President has of compelling consent on the part of the Senate is, says Mr. Wilson, his initiative. "The Senate hesitates to bring about the appearance of dishonour which would follow its

refusal to ratify the rash promises or to support the indiscreet action of the Department of State." In appointments, the control of the legislative branch would appear to be more complete, although not more beneficial. The manipulation of the Civil Service is one of the blots of the American system, and recently there has been an enormous advance of public opinion on the subject. The part played by the Senate in the "spoils system," as it is called, is thus described. "The President was compelled, as in the case of treaties, to obtain the sanction of the Senate without being allowed any chance of consultation with it, and there soon grew up within the privacy of 'executive session' an understanding that the wishes and opinions of each senator who was of the President's own party should have more weight than even the inclinations of the majority in deciding upon the fitness or desirability of persons proposed to be appointed to offices in that senator's State. There was the requisite privacy to shield from public condemnation the practice arising out of such an understanding." It will not fail to be noticed, however, that the practice, however open to objection in other respects, has tended to give the appointment of Federal officers to representatives of the State in which these officers have to act. A statute passed during the Presidentship of Andrew Johnson strengthened the position of the Senate in this matter by taking away from the President the absolute power of dismissal which he had theretofore

enjoyed. By the Tenure of Office Act * the consent of the Senate is now necessary to a removal. The secrecy of the executive sessions of the Senate deepens the impression produced by its direct assumption of control over the Executive, while the additional fact that its members are for the most part wealthy men has excited in some quarters the cry that the Senate has become a new and unconstitutional kind of aristocracy. Quite recently we have been told that there is a House of Lords question in America as well as in England, and that the old English remedy of stopping the supplies will have to be resorted to before the popular branch of the Legislature can acquire its due supremacy.

As it is, the question of supplies is the business to which both Houses devote themselves with most energy. The financial committees (Ways and Means and Appropriations) are the greatest of the standing committees, and are privileged in many ways. It is on Appropriation Bills that the House of Representatives permits itself the greatest freedom of debate.† The Senate, it must be noticed, holds in relation to finance a wholly different position from the House of

* A Bill for the repeal of this Act passed the last Congress and received the President's assent.

† "As a rule, every member has a chance to offer what suggestions he pleases upon questions of appropriation, and many hours are spent in business-like debate and amendment of such bills, clause by clause, and item by item. The House learns pretty thoroughly what is in each of its Appropriation Bills before it sends it to the Senate."—*Wilson*, p. 155.

Lords. The English rule has been adopted with a modification, which, according to Senator Hoar, entirely reverses its character. Bills for raising revenue must originate in the Lower House, but the Senate has the power of amendment. Under the procedure already described, this arrangement has, according to Mr. Hoar, operated to deprive the House of Representatives of equality with the Senate. The Senate receives the bills after they have been settled by the Lower House, and is, therefore, in full possession of the views of the House thereon, and can alter the settlement as it pleases. When the amended bills get back to the Lower House, there is no longer time for re-amendment; the matters at issue must be referred to a Conference Committee, and the report of that committee must be accepted or rejected as it stands. Mr. Hoar seems to think that the advantage intended to be given to the House of Representatives is in effect an additional limitation on its power. Another curious result is also to be noticed. The House of Representatives, it is said, generally grants an expenditure considerably less than the estimates call for; the Senate adds considerably to the grant of the Lower House. Neither side will yield, and recourse has to be had to the Conference Committee, whose report is necessarily in the nature of a compromise, which still leaves the grant below the requirements of the public service. "The result of the under-appropriation, to which Congress seems to have become addicted by long habit in dealing with the estimates, is the addi-

tion of another bill to the number of the regular annual grants. As regularly as the annual session opens there is a Deficiency Bill to be considered."* The restrictions of time have much to answer for in this somewhat tumultuous financial method. The conference must be resorted to, otherwise Congress would have to accept the discomforts of an extra-session, or, in the case of the short session ending on the 4th March, the House, if it failed to come to an agreement with the Senate, would have to leave the appropriations to be made by the next House. In the London newspapers of the 5th March we have the following telegram, describing the close of the last Congress :—"Congress has adjourned after a twenty-six hours' session, during which an enormous amount of business was done in a scandalously confused manner, almost irrespective of the merits of the measures passed. An extra-session will thus probably be obviated, although the failure of several Appropriation Bills will result in an embarrassing increase of surplus in the Treasury."

The last words quoted point to one reason why financial questions bulk so largely in the Federal legislature. They largely involve two great questions of policy—the policy of Protection and the policy of Internal Improvement. The latter is a consequence and a palliative of the former. It is only since 1870, according to Mr. Wilson, that schemes of internal improvement became part of the permanent policy of

* The quotations are from Wilson's "Congressional Governments."

the Federal Government. They were by some regarded as inconsistent with the principles of the Constitution; but "the admission of new States, lying altogether away from the sea, and therefore quite unwilling to pay the tariffs which were building up the harbours of their eastern neighbours, without any recompensating advantage to themselves, who had no harbours, revived the plans which the vetoes of former times had rebuffed, and appropriations from the national coffers began freely to be made for the opening of the great water-highways and the perfecting of the sea-gates of commerce. The inland States were silenced, because satisfied, by a share in the benefits of the national aid, which, being no longer indirect, was not confined to the sanctioning of the State tariffs, which none but the seaboard commonwealths could benefit by, but which consumers everywhere had to pay." The competition for these grants in aid of local purposes is one of the characteristic features of Congress, and it is here that the combination known as "log-rolling" has full play. No doubt a habit, not unknown among ourselves, has been engendered in the States of looking to the Central Government for pecuniary aid to schemes of local improvement which might better be left to local authorities, or possibly even to private enterprise. In this practice, however, is to be found another of those centripetal forces, undesigned by the framers of the Constitution, which counteract the possible disruptive tendencies of a system of State Governments.

THE STATE LEGISLATURES.—As Congress is the type of all legislative bodies in the United States, it is unnecessary to dwell at any length on the constitutional features of the Home Rule Parliaments of the several States. In character and capacity they must necessarily vary with the intellectual and moral qualities and resources of the States to which they belong. They are, of course, inferior to the Federal Legislature, and approach more nearly to the type of municipalities. Assembling for comparatively short sessions, they do not require in their members a permanent devotion to public life. The State capital, as compared with Washington, is at home, and the ordinary citizen can be freely drawn up to serve in a Legislature without any serious disturbance of his usual avocations. The Home Rule Parliaments may therefore be regarded as assemblies of unprofessional politicians. They are the average men of business, lawyers, farmers, or workmen, who for that occasion have been selected by their neighbours to represent them. A seat in the State Legislature is a position which may naturally come to any man, whether he specially affects an interest in politics or not. A seat in Congress is a vocation, and compels the possessor to become a professional politician, in the good, and not in the bad sense of that term.

No detailed characterisation of so many legislative bodies need be attempted here, and there must be few men competent to speak from actual knowledge of the whole of them. But on many points any

one Legislature may doubtless be taken as fairly typical of all. A young American politician, who has acquired a unique position for himself as a man of leisure, taking seriously to politics as a career in the English fashion, has written an account of his experiences as a member of the State Legislature of New York.* In the opinion of Mr. Roosevelt, the State Legislature of New York stands "about on a par with those of Pennsylvania, Maryland, and Illinois, above that of Louisiana, and below those of Vermont, Massachusetts, Rhode Island, and Dakota, as well as below the National Legislature at Washington." This average Parliament is, according to Mr. Roosevelt, neither wholly good nor wholly bad. The writer exhibits with perfect frankness all aspects of the State Legislature. His estimate appears to be that about one-third of the members are corrupt, one-third honest, and the remaining third weak and open to temptation. The worst members were those sent up by the great cities, where politics had fallen under the control of the machine and the "boss." Many members were absolutely owned, either by bosses or by wealthy individuals or firms, who had found it necessary for the protection of their pecuniary interests to have "representatives" of their own in the Legislature. The employer in these cases pays for the election of his men, with little regard to mere political issues. Where these are only concerned, the mem-

* Phases of State Legislation, by Theodore Roosevelt, *Century Magazine*, April 1885.

ber, says Mr. Roosevelt, is free to follow his own inclination; but when the property of his employer is concerned, he must come to heel. Mr. Roosevelt, who is himself a conspicuously honourable public man, is constrained to admit that the feeling against corporations and capital in general is such that these deplorable precautions are scarcely to be condemned. On the other hand, the character of the methods adopted by the corporations for self-protection is such that their success tends to exasperate this hostile feeling. A stranger in the United States, after a careful study of the newspapers during a political campaign, might be excused for thinking that the question of monopolies was the really dividing issue between parties. The term "monopoly" is used with a generous breadth of meaning, extending to all considerable aggregations of capital, whether in the hands of individuals or companies. Hence measures aimed at "monopolies" are among the most popular of platform schemes. Two facts peculiar to American enterprise go far to explain and justify this feeling. The immense accumulation of power and resources in single corporations is one; the other is the extent to which individuals control these corporations. A great railroad company may become the despot of a State or of several States, and the great company may itself be under the absolute dominion of one powerful stockholder. Corporations of all kinds suffer from this hostile feeling, which is really due to the enormous influence acquired by the individuals

through the use or the abuse of corporate machinery. We have it from Mr. Roosevelt that this feeling is played upon by unscrupulous legislators, who introduce measures attacking corporation interests, not with the intention of having them passed, but of using them to force blackmail from the proposed victims. That the corporations in turn are equally unscrupulous must, we fear, be admitted, and their resources, of course, are enormous. It is by no means an unheard-of thing that in a State where public feeling runs high against corporations, the members of the Legislature somehow contrive in the end to subserve the interests of the corporations in many important respects. The feud between the corporations and the public, which tells thus disadvantageously on the character of State legislation, demonstrates the importance of those Federal restrictions on State powers which we shall advert to in the next chapter.

The importance of the State Legislature depends less on the character of its members or the part they play in public life than on the magnitude of the interests committed to their charge. Great and real as are the restrictions upon State sovereignty, they still leave by far the largest portion of affairs under the regulation of State-made laws. The ordinary law between man and man is State-made law. Property and contracts, personal relations and political privileges, are subject to the regulation and control of the State. On all these subjects the Legislature is the mouthpiece

of the State, and the greatness of its functions makes great even the indifferently constituted assemblies of the smaller States.

It is probably a sound proposition in politics that laws involving the widest human interests are best left to Legislatures based on the largest area of representation. The subject of divorce, for example, would probably be more effectively and justly handled by an Imperial than by a Home Rule Parliament. On subjects of such far-reaching importance, the mere want of uniformity between State and State is itself an evil of great magnitude. But apart from that, it might be maintained that in matters of this class the larger assembly would, as a rule, produce wiser and juster legislation. Narrow views and contracted sympathies are more likely to mark the Parliament of a small State than the Congress of the nation, in which the mere variety of interests represented must force discussion up to a higher plane. As great despots are more likely than smaller tyrants to deal justly with general interests, so larger ideas of public justice may be expected to prevail in the larger Parliament. It would be surprising if the local Legislatures of America did not yield a large supply of unwise legislation, and if their legislation did not tend constantly to widen the region of State interference. Both directly by statute and indirectly through powers granted to local authorities, the State Parliaments have pressed hardly in many cases on the rights of individuals. Their legislation, as distinguished from that

of Congress or the British Parliament, may be described as the work of *amateurs*, that is, of men who are called together for short terms only, without any special preparation for the work of law-making, and without the discipline which comes from continuous occupation. The mischief of irresponsible and sentimental legislation is, however, corrected by another—the general habit of disregarding unworkable or meddlesome laws. The severity of the code is mitigated by laxity of practice. The Americans claim to be a law-abiding people, and, as far as submission to the ascertained voice of constituted authorities is concerned, the claim is just. But it is compatible with the existence of a disposition to wink at the evasion of statutes of an oppressive or merely vexatious character. It is a frequent saying that the law in the United States "is just as strong or as weak as public opinion makes it;" and public opinion is robust enough to tolerate the practical nullification of enactments the enforcement of which would do more evil than good. The maxim that the law must be enforced at any cost, no matter what kind of law it may be, would not appeal very powerfully to the average American citizen.

The State Legislature in general is far from being endowed with the extensive powers which we have noted above as inherent in the State itself, as distinguished from the Federal Government. In every case the people has refused to intrust its representatives with unlimited authority. In every State there is a

special Constitution, enacted directly by the people, by which the boundaries of legislative and all other governmental authorities are fixed. The conditions under which local statutory Parliaments exist cannot possibly be apprehended unless we keep in mind the fact, that they are bounded not only by the Federal Constitution, but by the special Constitution of the State. And the latter is generally a much more detailed and elaborate scheme than the former. The general scope of these limitations will be considered hereafter. At present we may note that they commonly contain provisions for the regulation of the procedure of the Legislature. The following may be given as a sample :—

Two-thirds of each House shall constitute a quorum to do business, but a smaller number may meet, adjourn from day to day, and compel the attendance of absent members. A quorum being in attendance, if either House fail to effect an organisation within the first five days thereafter, the members of the House so failing shall be entitled to no compensation from the end of the said five days until an organisation shall have been effected.

Each House when assembled shall choose its own officers, judge of the election qualification and return of its own members, determine its own rules of proceeding, and sit upon its own adjournments; but neither House shall without the concurrence of the other adjourn for more than three days, nor to any other place than that in which it may be sitting.

Each House shall keep a journal of its proceedings. The yeas and nays on any question shall, at the request of any two members, be entered, together with the

names of the members demanding the same, on the journals; provided that, on a motion to adjourn, it shall require one-tenth of the members present to order the yeas and nays.

Either House may punish its members for disorderly behaviour, and may, with the concurrence of two-thirds, expel a member, but not a second time for the same cause [nor for any cause known to his constituents antecedent to his election].

Each House shall have all the powers necessary for a branch of the legislature of a free and independent State.

Bills may originate in either House, but may be amended or rejected in the other, except that bills for raising the revenue shall originate in the House of Representatives.

Every bill shall be read by sections on three several days in each House, unless, in case of emergency, two-thirds of the House where such bill may be depending shall, by a vote of yeas and nays, deem it expedient to dispense with this rule; but the reading of a bill by sections on its final passage shall in no case be dispensed with, and the vote on the passage of every bill or joint-resolution shall be taken by yeas and nays.* Every Act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an Act which shall not be expresssd in the title, such Act shall be void only as to so much thereof as shall be expressed in the title.

A majority of all the members elected to each House shall be necessary to pass every bill or joint-resolution; and all bills or joint-resolutions so passed shall be signed by the presiding officers of the respective Houses.

* In the vote by yeas and nays each member is called upon by name, and states whether he votes yea or nay on the question.

No Act shall take effect until ninety days from the end of the session at which the same shall have been passed, except in case of emergency, which emergency shall be declared in the preamble or in the body of the law.

The members of the legislative assembly shall receive for their services a sum not exceeding three dollars a day from the commencement of the session, but such pay shall not exceed in the aggregate one hundred and twenty dollars per diem allowance for any one session."

Subject to these, or similar rules, which, being embodied in the Constitution, cannot be altered by the Legislature, and must be obeyed on pain of nullifying the proceedings, the Legislatures generally follow the lead set them by the practice of Congress. The system of devolution to committees prevails largely, with all its advantages and disadvantages. In some Constitutions the reference to the committee is made a necessary stage in the passing of a bill through either House.* The closure by previous question and the suspension of rules in order to facilitate business are also in constant use. One of the rules given above invites and compels a suspension—that which requires a bill to be read by sections on three separate days. No legislative assembly could endure the regular enforcement of such a rule, and emergency may be expected to be

* By the Constitutions of six States no bill can be considered for passage unless it has first been referred to a committee and reported therefrom : in Texas the report must be presented three days before the adjournment of the Legislature.

chronic wherever such a rule prevails. The indispensable reading of a bill on its final passage is itself a grievous infliction on the House, and a vicious waste of time. In Minnesota every bill must be read twice at length in order to pass. The reading of an elaborate city charter bill in a State Legislature is a sight to be remembered. The members betake themselves to reading, writing, talking, anything but listening, while the clerk hurries over the technical clauses in an undertone which permits many omissions. The rule utterly fails in its purpose, which may be presumed to be that of securing the attention of the House to every word of the bill. Much more efficient is the closure by stoppage of payment under such a rule as that which provides that the salaries of the representatives shall not continue beyond the period of forty days. Under that rule the session is likely to last forty days, and not a day longer. Whether the rule is a wise one is another matter. When it is remembered that a State Legislature is even less under the guidance of regular party leadership than Congress is, that its members are less practised in public affairs, while the interests intrusted to it are equally, if not more vital, the dangers of such a system will become apparent. It necessarily involves hasty and inconsiderate legislation, while it facilitates schemes of jobbery or fraud. In some States the Constitution provides that no bill shall pass which has not been introduced a certain number of days before the close of the session,—obviously a very im-

perfect remedy. If there were no great pressure of business in these Legislatures, the curtailment of their sittings would be an unmixed advantage; but an average State Legislature is probably just as much overburdened with legislative proposals as Congress itself. Most of them produce a goodly volume of statutes at the close of the session, and even in a minor State the bills presented in a forty days' session may equal the number of those submitted to the House of Commons in an ordinary year.*

* The following statement shows the constitutional provisions regarding the time and duration of the session in different States and Territories. In Rhode Island the Legislature meets twice a year; in Massachusetts, New York, New Jersey, South Carolina, once a year; in Vermont, Ohio, Maryland, Virginia, Arkansas, Oregon, Georgia, Alabama, Mississippi, Louisiana, Idaho, Wyoming, Utah, New Mexico, New Hampshire, Maine, Pennsylvania, Indiana, Illinois, Michigan, Wisconsin, Iowa, Minnesota, Kansas, Nebraska, Delaware, West Virginia, North Carolina, Kentucky, Tennessee, Missouri, Texas, California, Nevada, Colorado, Florida, Washington Territory, Dakota, Montana, Arizona, once in two years. The session is limited to sixty-one days in Indiana; to forty days in Colorado and Georgia; to sixty days in Minnesota, Kentucky, Arkansas, Nevada, Florida, Louisiana, and the Territories; to ninety days in Maryland and Virginia; to fifty days in Alabama; to forty-five days in West Virginia. Payment of members stops, either wholly or partially, after seventy-five days in Tennessee, seventy days in Missouri, sixty days in Texas and California, and forty days in Oregon. Besides the regular sessions, extra sessions may be called by the Governor. For a more detailed statement, see Stimson's "Digest of American Statute Law."

CHAPTER III.

THE SYSTEM AS A HOME RULE SETTLEMENT.

LET us now look at the system as a political settlement on the basis of Home Rule. Its leading and essential features may be summed up as follows :—

1. The Federal Constitution, which is the supreme law of the land, enumerates the subjects with which Congress may deal. This enumeration precludes the State Legislatures from dealing with these subjects, if Congress chooses to act, but not otherwise. All matters which are not expressly or by implication withdrawn from the States under this rule are reserved to the States. The matters expressly set aside as proper for Congressional action have been already set forth.* The enumeration is, or ought to be, founded on a discrimination between (to use our own phrase) imperial and local affairs. So far as appears, there is no complaint that the classification is other than a fair and proper one.

2. The Federal Constitution, besides withdrawing certain matters from the State Legislatures, imposes, even in respect of the matters reserved to them, certain important restrictions on their action.

* See page 12.

3. All these exclusions and restrictions are enforced by the Federal judiciary, which, from the Home Rule point of view, is perhaps the most important part of the constitutional system. A portion of it—the Supreme Court—is directly created by the Constitution, and therefore irremovable by Congress; the rest of it —the Circuit and District Courts—are statutory and dependent on Congress. The judicial power of the United States, as defined by the Constitution, has jurisdiction in two main classes of cases: those which arise under the Constitution, laws or treaties of the United States, or which affect the international relations of the United States, and those in which there is a difference of citizenship between the parties.* The law applied by the Federal judiciary is that of the State when the subject-matter is within the competency of the State Legislature, and as a rule it will follow the decisions of the State tribunals as implicitly as the enactments of the State Legislature.

4. Behind the Federal courts of course stands the executive force of the United States Government. It is a power in reserve rather than in presence. A very few officers are attached to each Federal court. The ordinary police power is entirely in the hands of the State authorities. Yet the Federal court which may have occasion to issue decrees directly in the teeth of the enactments of the State Legislature and the public opinion of the State, is as certain of being obeyed as are the tribunals of the State itself. Practically the

* See page 90.

presence of a Federal judge is sufficient to compel obedience to Federal law.

5. The Constitutions of the several States, although open to revision under certain conditions by the people of the State, may be regarded as additional limitations of the Home Rule Governments. In the case of the newer States, they are the constitutional compacts under which those States have been admitted to the Union, and they sometimes contain provisions declared to be unalterable except with the assent of Congress. The amendment of those Constitutions is generally a matter of considerable difficulty, and even solemnity. They are all framed very much on the same model, and together embody the matured opinions of the whole country as to what State Governments should or should not be permitted to do. It would be taking an entirely false view of the American system to overlook the restrictions thus placed upon the Home Rule Governments, although these restrictions are not imposed *ab extra*, and may be taken away by the people themselves.

The Federal limitations of State power, the State's limitations of its own Government, and the action of the Federal courts will bear to be examined in some detail.

FEDERAL LIMITATIONS.—There are three ways in which the Federal Constitution limits the powers of State Legislatures.

1. Certain enumerated subjects are by that Constitution assigned to Congress, and being so assigned,

cannot be dealt with by the State Legislatures if Congress chooses to exercise its powers.

2. The power of making treaties with foreign nations is, by the Federal Constitution, conferred upon the President, acting by and with the consent of the Senate. Any treaty so made becomes, like the legislation of Congress, part of the supreme law of the land, and State legislation inconsistent therewith is void.

3. The Federal Constitution enumerates certain things which State Legislatures are forbidden to do. These are contained in Art. 1, sec. 10:—

"1. No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

"2. No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress. No State shall, without the consent of Congress, lay any duty on tonnage; keep troops or ships of war in time of peace; enter into any agreement or compact with another State, or with a foreign power; or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

The amendments to the Constitution contain other restrictions, of which the following only need be cited:—

Art. 14.—1. All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. The validity of the public debt of the United States authorised by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection and rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, or claims shall be held illegal or void.

On the other hand, Article 10 of the Amendments says, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively and to the people."

"It is," says Mr. Cooley, "a settled rule of construction that the limitations it (the Constitution) imposes upon the powers of Government are in all cases to be understood as limitations upon the Government of the Union only, except when the States are expressly mentioned. As illustrations, the sixth and seventh amendments to the Constitution may be mentioned. These constitute a guarantee of the right of trial by jury; but as they do not mention the States, they are not to be understood as restricting their powers; and

the States may, if they choose, provide for the trial of all offences against the States, as well as for the trial of civil causes in the State courts, without the intervention of a jury, or by some different jury to that known to the common law."

These restrictions are expressed, it will be seen, in concise general terms, which in some instances contrast with the prolific development of principles in the courts.

The Federal Constitution does not expressly restrict the Legislatures of the State. It deals with the States as units, and its prohibitions consequently apply to every form of State power. They affect not only State enactments, but State Constitutions and State courts. The power inherent in the people of a State of amending their Constitution is subject, among other conditions, to this, that it must contain no provision which would amount to an exercise of the powers expressly or impliedly prohibited to the States by the Constitution of the Union. It would be the duty of all courts, both State and National, to declare such provisions void, whether enacted by the people directly, in their primary capacity as makers of the fundamental law, or in the form of statutes, through the delegated power of their Legislature.*

The same considerations apply to the manifestation of State power through its tribunals. Means are provided for appealing to the Supreme Court at Washington from a decision of the highest court of a State, against the validity of a treaty or statute of the

* Cooley's "Constitutional Limitations," p. 42.

United States. The Constitution of the United States is, of course, the supreme law of the land, declared (Article 6) to be binding on the judges of the State courts; but the principle appears to be carried still farther. The construction of a State statute or Constitution by the highest State court is conclusive; and if the Federal courts should previously have construed the statute differently, they will, in any new case, abandon their own construction and adopt that of the State court. But when, under a settled construction of a State statute, contracts have been entered into, they will be protected by the Federal courts from a subsequent contrary construction of the statute by the State courts. The settled construction of a statute is held to be, like the statute itself, part of the obligation of a contract made with reference to it.

A treaty duly made and ratified becomes, like a Federal statute, part of the supreme law of the land, and State legislation in violation of it is null and void. A subsequent law of Congress repugnant to a treaty to that extent abrogates it. Questions as to the effect of treaties on State laws have arisen in a large number of cases.

With reference to the restrictions on the State Legislatures by the express grant of powers to Congress, it may be repeated that it is in general the exercise of the power of Congress, and not the mere grant of the power to Congress, which excludes the States. "The full sphere of Federal power may, at the discretion of Congress, be occupied or not, as the

wisdom of that body may determine. If not fully occupied, the States may legislate within the same sphere, subject, however, to any subsequent legislation that Congress may adopt." * Thus, in the absence of a national bankruptcy law, the States may, under the usual restrictions applying to all their legislative acts, pass bankruptcy laws of their own. Wherever the exercise of the powers granted to the Federal Government would be hindered by the exercise of similar powers on the part of the States, the powers of the State are to that extent to be deemed to be withdrawn. One important application of this principle affects the right of the State to tax the agencies, offices, or debts of the Federal Government. In the case of Macculloch *v.* Maryland, 4 Wheat. 316, the State of Maryland claimed the right of taxing a bank within its territorial limits established by authority of Congress. The principle contended for was pronounced by Chief-Justice Marshall to be fatal to the Constitution. It would be "capable of avoiding all the measures of the Government and prostrating it at the foot of the States. The American people have declared their Constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy in fact to the States. If the States may tax one instrument employed by the Government in the execution of its powers, they may tax any and every other instrument. This was not intended by the American people. They did not

* Cooley's "Principles of Constitutional Law," p. 35.

design to make their Government dependent to the States." The like limitation is recognised on the powers of Congress with respect to the taxation of State means and instruments, and for the same reasons. In like manner, the power of the States to tax persons and property within their limits must not be so exercised as to interfere with the operation of the laws made by Congress for the regulation of commerce (see Inman Steamship Co. *v.* Jenker, 94 U.S. 238). So with police regulations made by State or municipal authorities, which may come in conflict with the power of Congress. The line of demarcation in such cases between the State and Federal spheres is often extremely difficult to trace.

Of the express restrictions on the legislative power of the State as set forth above, the most important for our purpose are those which protect contracts and property or vested rights.

It has been frequently observed that the framers of the Constitution appear to have had no conception of the importance which was fated to be attained by the clause forbidding Acts which should impair the obligation of contracts. It is dismissed very briefly in the "Federalist" as a security against legislation which would violate the first principles of the social compact. No principle of the Constitution has been so elaborately expounded by the courts, and none has had an interpretation more favourable to just legislation. "Apparently," says Mr. Cooley, "nothing was in view at the time except to prevent the repudiation

of debts and private obligations, and the disgrace, disorder, and calamities that might be expected to follow. In the construction, however, of this provision, it has become one of the most important, as well as one of the most comprehensive, in the Constitution."

One of the earliest applications of the rule occurred in reference to a case in which the Legislature of Georgia had revoked a grant made by a previous Legislature, on the ground that it had been obtained by fraud. Chief-Justice Marshall, after declaring that all contracts, executed or executory, come within the rule, proceeds to say:—"Since, then, a grant is a contract executed, the obligation of which still continues, and since the Constitution uses the general term 'contract' without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seised of their former estates, notwithstanding those grants, would be as repugnant to the Constitution as a law discharging the vendors of property from the obligations of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the Constitution, while an absolute conveyance remained unprotected. If, under a fair construction of the Constitution, grants are comprehended under the term 'contracts,' is a grant from the State excluded from the operation of the provision? Is the clause to be considered as inhibiting

the State from impairing the obligations of contracts between two individuals, but as excluding from that inhibition contracts made with itself? The words themselves contain no such distinction. They are general, and applicable to contracts of every description." The same principle was applied to an Act of the Legislature of Virginia for the disendowment of the Episcopal Churches, which held property under grants from the Crown or the old Colony of Virginia. The Constitution of the State prohibited the possession of exclusive privileges by any religious denomination, and the Legislature ordered glebe-lands on the happening of a vacancy to be sold and applied for the benefit of the poor; but the Act was held unconstitutional by the Supreme Court. Disendowment, as distinguished from Disestablishment, would therefore appear to be beyond the competency of a State Legislature. Another remarkable development of the principle took place in the famous Dartmouth College case, by which charters granted to private corporations were held to be irrevocable, as contracts made between the State and the members of the corporation. "It is under the protection of the decision in the Dartmouth College case," says Mr. Cooley, "that the most enormous and threatening powers in our country have been created: some of the great and wealthy corporations actually having greater influence in the country at large and upon the legislation of the country than the States to which they owe their corporate existence. Every privilege granted or right conferred—no matter

by what means or on what pretence—being made inviolable by the Constitution, the Government is frequently found stripped of its authority in very important particulars by unwise, careless, or corrupt legislation, and a clause in the Federal Constitution, whose purpose was to preclude the repudiation of debts and just contracts, protects and perpetuates the evil." * Even an agreement by the State—made for a real or supposed consideration—to exempt certain property from taxation, is a protected contract within the rule, although the principle has not been carried so far in other matters which appear no more essential than the power of taxation to the sovereign character of the State. A State, Mr. Cooley thinks, "cannot barter away, or in any manner abridge or weaken, any of those essential powers which are inherent in all Governments, and the existence of which in full vigour is important to the well-being of organised society."

The words of the Constitution are that the "*obligation* of a contract" is not to be impaired. This means the obligation imposed on the parties by the law as existing at the time the contract was made. "If any subsequent law affects to diminish the duty or impair the right, it necessarily bears on the obligation of the contract in favour of one party to the injury of the other; hence any law which in its operation amounts

* "Constitutional Limitations," p. 340. Franchises and other property of corporations may be taken for public use, like other property, on compensation being made.

to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution." Thus a law giving interest on debts which carried no interest when they were contracted, or a law authorising the compulsory purchase of ground rents (leasehold enfranchisement), on payment of a sum in gross, have been held to be *ultra vires*. So a Homestead Exemption Law, or a law increasing the limit of the value of exempted property, cannot be made applicable to debts existing before the passing of the law. But changes which merely affect the legal remedy are not *ultra vires*, unless, indeed, they attempt to deprive one of the contracting parties of his legal remedy altogether, as when persons who had participated in the rebellion were declared incapable of maintaining suits. A law which forbids property taken in execution to be sold for less than two-thirds its appraised value is void as to contracts made under a state of the law which allowed the property to be sold to the highest bidder. When a statute took away from mortgagees the right of possession until after foreclosure, it was held that this deprived the mortgagee of the right to add to his security by the perception of rents and profits, and subjected him to a new risk of depreciation in its value. So laws extending the time of redemption after foreclosure, or staying execution for an indefinite period, or forfeiting charters for acts not causing forfeiture at the time of the grant, or repealing a statute which made

shareholders in a company liable for its debts, have been held void as impairing the obligation of contracts. Even in the case of actions for the purchase price of slaves, brought after the Emancipation on contracts made before it, a State Constitution declaring such contracts to be no longer enforceable has been held invalid.

One of the most curious examples of the operation of the rule is to be found in its application to laws dealing with insolvency. The States may legislate on this subject so long as Congress does not pass a general law; but State laws of insolvency "discharging the personal property of the debtor, and thereby terminating the legal obligation of the debts, cannot constitutionally be made to apply to contracts entered into before they were passed." Moreover, while contracts made within a State between its own citizens will be held to have reference to the insolvency laws in existence at the date of contract, no such presumption will be made in the case of contracts within the State to which strangers are parties, nor to contracts made without the State between a citizen and a stranger, or even between two citizens, although this last limitation appears to be doubtful. And the fact that payment is to be made within a State does not subject the contract to the insolvency laws of that State.

Scarcely less important, and very similar in effect, is the restriction contained in the 14th Amendment, that "no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any

person within its jurisdiction the equal protection of the laws." "Due process of law" means much more than merely regular procedure authorised by statute. It means compliance with certain principles of justice which have not been very precisely defined. "It is intended," says Mr. Justice Johnson in the Supreme Court, "to secure the individual from the arbitrary exercise of the powers of Government unrestrained by the established principles of private rights and distributive justice." As applied to property, the restraints are summed up by Mr. Cooley as follows: "That when specific property is taken, a pecuniary compensation, agreed upon or determined by judicial inquiry, must be paid; and in other cases property can only be taken for the support of the Government, and each citizen can only be required to contribute his proportion to that end. But there is no rule or principle known to our system under which private property can be taken from one person and transferred to another for the private use and benefit of such other person, whether by general law or by special enactment. The purpose must be public, and must have reference to the needs and convenience of the public; and no reason of general public policy will be sufficient to validate other transfers when they concern existing vested rights." But courts do not regard rights as vested contrary to the justice and equity of the case, as when a grantor in an invalid conveyance desires to take advantage of its invalidity. Retrospective legislation, intended to cure invalid contracts, or to give effect to the intention

of parties which had failed through some want of compliance with the existing law, is entirely constitutional, and a contracting party has no vested interest in the defect which the Legislature is bound to respect. But when he has parted with his property, after the invalid conveyance was made to a third and innocent person, the Legislature cannot, by validating the first conveyance, take away the rights of the latter. The line of vested rights which the State in its legislation must not cross is indicated by the two following contrasted cases.

A statute of the State of Kentucky proposed to compel owners of wild lands to make improvements therein within a specified time, on pain of the lands being forfeited to the State. This statute was held judicially to be unconstitutional. Mr. Cooley's conclusion is significant:—

"It would be difficult to frame, consistently with the general principles of free government, a plausible argument in support of such a statute. It was not an exercise of the right of eminent domain. . . . It was not taxation. . . . It was not a police regulation. It was purely and simply a law to forfeit a man's property if he failed to improve it according to a standard which the Legislature had prescribed. To such a power, if possessed by the Government, there could be no limit but the legislative discretion; and if defensible on principle, then a law which should authorise the officer to enter a man's dwelling and seize and confiscate his furniture if it fell below, or his food if it exceeded, an established legal standard would be equally so." * And

* Cooley's "Constitutional Limitations," p. 477.

he declares "that the right of every man to do what he will with his own, not interfering with the reciprocal rights of others, is accepted among the fundamentals of our law."

In other words, the constitutional provision we have been discussing renders null and of no effect all attempted legislation by the States in the direction indicated.

On the other hand, what are termed *betterment* laws are pronounced to be constitutional. They provide, as in the example given by Mr. Cooley, that when a man has been ejected from land to which he *bonâ fide* believed that he had a good title, he should be entitled to recover from the successful plaintiff the value of any improvements which he had made during his period of possession. But the benefit of the law was not given to one who had entered under a contract unless the owner had failed to fulfil the contract on his part. The principle, however, appears to have been jealously watched, and an Act which permitted the occupying claimant either to demand the value of his improvements or to pay to the successful plaintiff the value of the land *minus* the value of the improvements was held to be unconstitutional, as a palpable violation of the right of private property.

Another remarkable example of the restrictive intent which is now held to reside in the simple provisions of the Federal Constitution is to be found in the question started by Mr. Cooley, whether a State Legislature could

set aside the maxim of the common law, that no man should be a judge in his own case, by permitting one to act judicially in a controversy in which he was interested. Mr. Cooley quotes Lord Coke to the effect that "even an Act of Parliament made against natural equity as to make a man judge in his own case is void in itself;" although he does not go so far as to say that such an Act would be held void by an English court at the present day. But he does not see how a State Legislature without express authority from the people could establish such a principle. And he doubts if even the people in their Constitution could now establish so great an anomaly, "since the adoption of the 14th article of the Amendments to the Federal Constitution, which denies to the State the right to deprive any one of life, liberty, or property without due process of law."

The possible scope of this famous amendment is even more strikingly illustrated by its occasional collision with the most characteristic and essential of all State powers—the power of taxation. It is perfectly obvious that a Legislature which could impose taxes according to any rule of discrimination that seemed good to it, or could exact heavier imposts from particular classes or individuals than from the rest of the community, would hold in its hands the means of evading many of the restrictive principles which we have been discussing. Many of the State Constitutions take this matter in hand, and ordain it as a rule for the Legis-

lature to follow that all taxation shall be equal and uniform. But it has apparently been decided that the 14th Amendment to the Federal Constitution itself implies this principle. Mr. Cooley, with that large appreciation of the necessary and unalterable limits of legislative authority which characterises his admirable works, pronounces this rule to be no more than an affirmance of a settled principle of constitutional law.

The point was directly involved in a case recently decided in the Federal circuit court (ninth circuit) in California—the case of San Mateo County *v.* Southern Pacific Railroad Company. There the court had to decide the validity of a provision in the Constitution of California, whereby property under mortgage was, for the purposes of taxation, ordered to be assessed, as to the mortgage, to the mortgagee, the owner being taxed on the value of the property less the amount of the mortgage, whereas the property of railroad companies operating in more than one county was to be assessed to the companies without any deduction for mortgages. The court held that "in the different modes thus prescribed of assessing the value of the property of natural persons and of the property of corporations there was a departure from the rule of equality and uniformity," a violation of the 14th Amendment. That article, it was held, in declaring that no State shall deny to any person within its jurisdiction the equal protection of the law, imposes a limitation upon the exercise of all the powers of the State which can touch the individual or his property, including among these that of taxation. It implies not only that he has a right to resort on the same terms with others

to the courts of the country for the security of his person and property, the prevention and the redress of wrongs, and the enforcement of contracts, but also that he is exempt from any greater burden or charge than such as are equally imposed upon all others in like circumstances. This equal protection forbids unequal exactions of all kinds, including unequal taxation. Moreover, the Constitution and the law of California on this subject made no provision for notice being given to the owner at any stage of the proceedings, and this omission was held to violate the guaranty that no person should be deprived of property without due process of law. The 14th Amendment is not to be limited to legislation affecting the negroes, although that was the subject-matter out of which it grew. "It requires," says Mr. Justice Field, "that in all State legislation hostile and partial discrimination against any class or person shall be avoided. It stands in the Constitution as a perpetual shield against all unequal and partial legislation by the States, and the injustice which follows from it, whether directed against the most humble or the most powerful, against the despised labourer from China, or the acred master of millions." *

Another example of interference, although on different grounds, with the State's power of taxation is the case of the "State-Tax on Foreign Held Bonds," † in which the Federal court denied the right of the State to tax the bonds of railroad companies in the hands of non-residents. The power of taxation, it was said by the court, is limited to subjects within the jurisdiction. "The bonds issued by the railroad company in this case are undoubtedly property, but property in the hands of the holders, not property in the obligors. So far as they

* Reported in 13 Federal Reporter, 722.

† Reported 15 Wallace's Reports, 300.

are held by non-residents, they are property beyond the jurisdiction of the State. The law which requires the treasurer of the company to retain five per cent. of the interest due to the non-resident bondholder is not, therefore, a legitimate exercise of the taxing power. It is a law which interferes between the company and the bondholder, and, under pretence of levying a tax, commands the company to withhold a portion of the stipulated interest and pay it over to the State. It is a law which thus impairs the obligation of the contract."

The power of Congress "to regulate commerce with foreign nations and between the States" has been noticed as having frequently impinged upon the prerogatives of the State Governments. This power has been held to extend to all forms of intercourse between State and State and between nation and nation, "from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth." So said the Supreme Court in a judgment which denied the power of a State to grant exclusive privileges to telegraph companies within its own borders. Nor is actual legislation by Congress itself necessary to exclude the State Legislature from this domain. When Congress has not legislated, it is held to have adopted the rule of the common law. "Inaction by Congress is equivalent to a declaration that the commerce under its control shall remain free and untramelled. Therefore State legislation which undertakes to prohibit the driving or carrying of Texan, Indian, or Mexican cattle into the State during certain seasons of the year is void, though conflicting with no Act of Congress."* On the other hand,

* Cooley's "Principles of Constitutional Law," p. 72.

the State Government has exclusive possession of the "police power," defined by Cooley as the "authority to establish those rules of good conduct and good neighbourhood which are calculated to prevent a conflict of rights, and to secure to each the uninterrupted enjoyment of his own." It extends to "every person, every public and private right, everything in the nature of property, every relation in the State or society, and in private life." It resides inalienably in the States, and Congress can only see that it is not colourably used to impede or thwart the functions of the National Government. So long as it is properly used, not only the power of Congress to regulate commerce, but all other limiting principles, must be understood as giving way to it.

These examples will be sufficient to give a general idea of the restrictions imposed on the freedom of the State Governments by the express provisions of the Federal Constitution, and the jurisprudence that has grown out of them. The largeness of the superstructure is in striking contrast to the few brief sentences of the written law which are the foundation. Nothing better shows the advance which a century has made in the consolidation of the Central Government than a comparison between the last recorded declarations of the courts and the original framework of the Constitution. In the famous "Legal Tender Case," which was decided not long ago, the opinion of the court is declared by a competent critic to amount to not less than this, that Congress itself is the sole and responsible judge of the validity of all acts that are not expressly prohibited, and this under a Constitution which is supposed to limit its functions to enumerated powers, and reserve

all the rest to the State authorities. Nor will it escape the notice of the English reader that, in the few examples we have been able to give of legislation which has been held to be *ultra vires* of the States, there are some bearing a strong likeness to measures now before Parliament or already passed into law. What may be termed exceptional legislation, particularly with reference to contracts, has doubtless been chiefly called for by the exceptional circumstances of Ireland; but even in the general legislation of the Imperial Parliament many things are done or proposed to be done which would be either incompetent or of very doubtful validity if attempted by a domestic Legislature under the American system.

STATE LIMITATION.—Then above and beyond the Imperial restrictions there are the limitations which the people of the State themselves impose upon their own Legislature through the enactments of the State Constitution. When these enactments are violated by a measure passed by the State Legislature, it is the duty of any court in which the question may be raised to declare them null and void. It is the business of the State courts to interpret both the Constitution and the statutes of the State, and, subject to what is said elsewhere, the opinion of the State court will be followed as conclusive by the courts of the United States.

A STATE CONSTITUTION usually contains, first, a Bill of Rights; secondly, a scheme for the organisation of the State government in three branches, legis-

lative, executive, and judicial; and thirdly, a series of restrictions on the powers of the Legislature, mandatory or prohibitive. "It may generally be said that the Constitutions of the Western States are more elaborate, more cumbrous, and more frequently amended than those of the Eastern. One reason for this is, that in the West the State Constitution is frequently made the instrument for making laws which are in most States unconstitutional; another, that in the West many things are put into the Constitution which are elsewhere left to the Legislature." * In other words, the Western democracies are less inclined to trust their representatives, and accordingly withdraw many subjects altogether from their control.

The Bill of Rights in a State Constitution is generally a compendium of declarations on the subject of the fundamental rights of the citizen. The English Bill of Rights is generally incorporated, modified "by the addition of new provisions of a similar nature founded on Magna Charta, the Declaration of Independence, and the Constitution of the United States and old Province Charters." The right to life, liberty, equality, property, and the like need not be regarded as a limitation on legislative powers. Freedom of conscience, especially in matters of religion, is pretty generally asserted. Five Constitutions expressly provide that there shall be no established Church, and twenty-four that no man can be compelled against his consent to support or attend any church. In fourteen

* Stimson's "American Statute Law," p. 1.

States the Constitution prohibits grants of public money to any Church or sectarian institution. In New Hampshire the Legislature is empowered to authorise towns or parishes to provide at their own expense for the support of Protestant ministers. Twenty-seven Constitutions declare that no religious test shall be required as a qualification for office; but five exclude those who deny the existence of a Supreme Being. In all the States except New Hampshire and Delaware the Legislature is directed to establish a system of free education, which, moreover, is pretty generally required to be of secular, or at least unsectarian, character, and less generally includes regulations compelling the attendance of children between specified ages. Freedom of speech, the right to bear arms, the right to hold public meetings for the redress of grievances and the instruction of representatives, trial by jury in civil and criminal cases, are all specially protected from legislative interference in the Constitutions of many States. Imprisonment for debt is prohibited in most Constitutions, and the exemption of the homestead and of necessary personal property from sale or seizure under ordinary legal process is ordained in nearly one-half of the Constitutions.* Most of the State Constitutions contain provisions to protect private property from being tampered with

* The principle of exempting necessaries to a limited amount is practically universal in legislation, but in nineteen States it is made compulsory by the Constitution, and in sixteen the homestead is similarly protected.

by the Legislature. Thus in twenty-six States it is specially ordained in the Constitution that no man's property shall be taken from him for public purposes without due compensation, which, as a rule, must be ascertained by a jury. In others, no property is to be taken for public uses without the owner's consent or full compensation. Some Constitutions have similar declarations as to the taking of property in certain cases for private uses, such as rights-of-way, drains, flumes, &c. A few Constitutions prohibit discriminations between citizens and aliens with respect to the enjoyment and possession of property, real or personal. Provisions safeguarding the rights of accused persons under the criminal law are also very general. Trial by jury, excessive bail, Habeas Corpus, change of venue, the right to appear by counsel and compel the attendance of witnesses, restraints on excessive punishments, are among the most frequent headings. Most of the Constitutions repeat the language of the Federal Constitution in prohibition of *ex post facto* legislation.* Some Constitutions contain special provisions relating to particular kinds of offences, as duelling, bribery, "lobbying," corrupt legislation, embezzlement of public funds, &c. These, it may be presumed, are placed in the Constitution because the Legislatures were more or less reasonably supposed to be unlikely to handle them with sufficient stringency.

* The rule against *ex post facto* legislation applies only to the criminal law.

In the general provisions restraining and defining the province of legislation there is obvious a prevailing policy of uniformity and equality between man and man and between class and class. Nearly all the Constitutions contain a clause expressly forbidding partial legislation in large classes of subjects, which vary in the different Constitutions. Sometimes it is declared generally that no special, local, or private law may be passed in any case for which provision is or may be made by general law, or where relief can be obtained in the ordinary tribunals of the State. The following are examples of matters respecting which local or special legislation is forbidden by many Constitutions, viz., matters concerning

The opening or vacating of public roads, highways, squares, &c.

The sale or conveyance of real estate.

The validation of informal deeds.

Changes in the law of descent.

The interest on money.

The legitimation of children.

Changes in names of persons.

Adoption.

Divorce.

Corporations, in respect of their creation, charters, franchises, or exclusive privileges.

The powers and duties of justices of the peace, magistrates, &c.

The incorporations of cities, towns, and villages, location of county seat, &c.

The assessment and collection of taxes and exemptions from taxation.

Fees and salaries of public officers.

Elections.
Judicial procedure and rules of evidence.
Public schools.

Some of the subjects mentioned above are in many Constitutions surrounded with elaborate limitations. This is especially the case with private Corporations. In most States no company can be incorporated except under general statutes, and sometimes the Constitution settles the general principles which such statutes must respect. Railroad and banking companies are frequently subjected to Constitutional restrictions peculiar to themselves. In some States the prohibition or regulation of the liquor traffic, in others the protection of labour, is elevated to a place among the Standing Orders—as they may fittingly be called—which the people issues to its representatives in the Legislature.

These Constitutional provisions show how far the State Legislature is from possessing the unfettered freedom which we associate with the power of Parliament. Changes in the Constitution may, as a general rule, be brought about on the initiation of the Legislature, by a plebiscite or general popular vote. But in most cases bare majorities of the Legislature are not sufficient to bring a proposed amendment of the Constitution to a popular vote. Sometimes the proposal must be approved by a two-thirds or three-fourths vote of both Houses, and sometimes by a simple or proportional majority of two successive Legislatures.

In most cases a majority of the popular vote is sufficient to carry a Constitutional amendment. Moreover, provision is generally made for a general revision of the whole Constitution, in a special convention to be called for that purpose, on the initiation of the Legislature, ratified by a popular vote; while in some States the question whether such a convention should be held must be regularly referred to the people at stated intervals of ten, or it may be twenty years.

THE JUDICIARY.—The chief instrument in the development of the limitations on State powers has been the Federal Judiciary. Congress itself has no direct relations with the State Legislatures; it cannot control them, or issue orders to them, or affect their conduct in any way. The imperial and the local Legislature stand side by side, dividing the field of legislation between them; if the measures passed by either overstep the proper boundaries, it will be for the courts to say so when such measures are brought in question in any suit or action arising before them. The courts themselves do not directly interfere with the Legislatures by way of mandamus injunction or otherwise, and they only pass judgment upon the validity or invalidity of legislation in the course of legal proceedings. Nor does the Federal court interfere directly with the State court. They, too, may be described as standing side by side, dividing between them the field of judicature, as the Legislatures, State and Federal, divide between them the field of legislation. Neither set of

tribunals acts directly upon the other, or issues orders to the other, or, except as hereafter shown, hears appeals from the other. A State tribunal may properly sit in judgment on the constitutionality of a statute of the United States, but in all such controversies the Federal tribunals have the last word, and in that last word resides the power which has enabled them to change the face of the Constitution. It is not infrequently assumed in this country that the Federal Supreme Court at Washington is a court of appeal of the last resort for the whole country, like the House of Lords in our own system. On the contrary, the highest State court is the last court of appeal for all ordinary questions within its jurisdiction. It may happen that on some questions a principle of law may be enforced by the one set of tribunals which the other set disavows in like cases, but, speaking generally, and subject to modifications which will be made apparent immediately, the State Court declares the law, constitutional and statutory, of the State, just as the Federal Court declares the law, constitutional and statutory, of the Union, and each of the two judicatures has conclusive authority in the cases appointed to it.

The judicial powers imparted to the "United States" by the Constitution are defined in the third article:—

Sect. 1. The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain

and establish. The judges both of the Supreme and inferior Courts shall hold their offices during good behaviour, and shall at stated times receive for their services a compensation which shall not be diminished during their continuation in office.

Sect. 2. The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority—to all cases affecting ambassadors, other public ministers, and consuls—to all cases of Admiralty and maritime jurisdiction —to controversies to which the United States shall be a party—to controversies between two or more States —between a State and citizens of another State—between citizens of different States—between citizens of the same State claiming land under grants of different States, and between a State or the citizens thereof, and foreign States, citizens, or subjects.

Sect. 3. In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as Congress shall make.

The trial of all crimes except in cases of impeachment shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State the trial shall be at such place, or places, as the Congress may by law have directed.

Congress has accordingly, from time to time, passed Acts establishing and regulating the inferior courts, by which, together with the Supreme Court, the judi-

ciary powers of the Constitution are to be exercised. All of these courts are strictly limited to the jurisdiction conferred upon them by the Constitution or the Acts of Congress respectively. All judicial powers other than those enumerated in the Constitution may be deemed to be retained by the separate State—at all events they are not exercisable by the Federal courts. Two aliens, for example, or two English companies in litigation, would not be within the jurisdiction of the Federal courts.*

For judicial purposes the United States are divided into nine circuits. The circuit courts in each circuit may be held by the justice of the Supreme Court allotted to the circuit, or by the circuit judge of the circuit, or by the district judge of the district sitting alone, or by all or any two sitting together.

The following are the circuits, with the States which they include:—

* See Cooley's "Principles of Constitutional Law":—"Congress may apportion among the several Federal courts all the judicial power of the United States, or it may apportion a part only, and in that case what is not apportioned will be left to be exercised by the courts of the States. Thus the States may have a limited jurisdiction within the sphere of the judicial power of the United States, but subject to be further limited or taken away by subsequent Federal legislation. Such is the state of the law at this time; many cases within the reach of the judicial power of the United States are left wholly to the State courts, while in many others the State courts are permitted to exercise a jurisdiction concurrent with that of the Federal courts, but with a final review of their judgments on questions of Federal law in the United States Supreme Court" (p. 109).

1st Circuit.—Maine, New Hampshire, Massachusetts, and Rhode Island.

2nd Circuit.—Connecticut, New York, and Vermont.

3rd Circuit.—New Jersey, Pennsylvania, and Delaware.

4th Circuit.—Maryland, West Virginia, Virginia, North Carolina, and South Carolina.

5th Circuit.—Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas.

6th Circuit.—Ohio, Michigan, Kentucky, and Tennessee.

7th Circuit.—Indiana, Illinois, and Wisconsin.

8th Circuit.—Iowa, Missouri, Kansas, Arkansas, Colorado, Minnesotta, and Nebraska.

9th Circuit.—California, Nevada, and Oregon.

A circuit court is held in each "district" twice annually. There are at the present time fifty-one districts—a district being mostly coterminous with a State, but some States having two or more districts. In each district there is a district court and a district judge. The entire judicial force is thus distributed:—Nine judges of the Supreme Court, each of whom is allotted to one of the nine circuits; nine circuit judges; and fifty-one district judges.

The circuit judges are of recent institution (1869), the circuit courts having formerly been held by the judges of the Supreme Court, each sitting in the circuit assigned to him, with or without the assistance of the district judges in their respective districts.

The jurisdiction of the district courts is of no particular interest in relation to our present subject. The jurisdiction of the circuit court is now defined by Act of March 3, 1875, as follows:—

"The circuit courts of the United States shall have

original cognisance concurrent with the courts of the several States of all suits of a civil nature at common law or in equity when the matter in dispute exceeds, exclusive of costs, the sum or value of 500 dollars, and arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, or a controversy between citizens of the same State claiming lands under grants of different States, or a *controversy between citizens of a State and foreign States, citizens, or subjects.*"

Section 2 of the same Act provides—

"That any suit of a civil nature at law or in equity now pending or hereafter brought in any State court, where the matter in dispute exceeds, exclusive of costs, the sum or value of 500 dollars, and arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different States, or a controversy between citizens of the same State claiming lands under grants of different States, or a *controversy between citizens of a State and foreign States, citizens, or subjects*, either party may remove said suit into the circuit court of the United States for the proper district.

"Congress," says Mr. Cooley, "has, with few exceptions, left the parties at liberty to bring their suits in the State courts, irrespective of the questions involved, but has made provision for protecting the Federal authority by a transfer to the Federal courts, either before or after judgment, of the cases to which the

Federal judicial power extends." The transfer *after* judgment is thus effected:—"A final judgment or decree in any suit in the highest court of a State in which a decision could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is *against* their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution and treaties or laws of the United States, and the decision is *in favour* of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution or any treaty or statute of, or commission held or exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority, may be re-examined and revised or affirmed in the Supreme Court on a Writ of Error."* In other words, wherever any right, title, &c., claimed under the authority of the Federal Government, is denied by a decision of the highest State court of appeal, such decision may be appealed to the Supreme Court at Washington.

On the other hand, the general rule that the Federal courts will follow the decisions of State courts on questions of State law is qualified by a jealous regard for the principles of the Federal Constitution. While in general a Federal court will abandon a previously

* Revised Statutes of the United States, 1875.

expressed opinion of its own which has been overruled by the State courts, it will not follow the State court in a change of opinion which would "impair the obligation of a contract." The settled judicial construction of a State statute is held to be, like the statute itself, part of the obligation of contracts made with reference to it. The Federal courts have been steadily extending their prerogative in this regard, and their present position is pretty clearly expressed in a recent decision.* The Federal circuit court for Missouri had given a decision in a case before it in favour of the defendant. The Supreme Court of the State, in a suit by another plaintiff on the same cause of action, decreed against the same defendant. The Supreme Court at Washington refused to follow that decision, holding that the Federal courts have an independent jurisdiction co-ordinate with that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of State laws. When by a course of decisions in the State courts rules are established which become rules of property and action in the State, the Federal courts will always regard such rules as an authoritative declaration of what the law is. "But when the law has not been thus settled, it is their right and duty to exercise their own judgment, as they always do in reference to the doctrines of commercial law and general jurisprudence; and when contracts and transactions have

* Burgess *v.* Lilymann, reported in 107 United States Supreme Court Reports, p. 20.

been entered into, and rights have accrued thereon under a particular state of the decisions of the State tribunal, or when there has been no decision, the courts of the United States assert the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be given by the State courts after such rights have accrued."

The influence of the Federal courts on the development of the Constitution has been greatly strengthened by the high character and capacity of its members. The Federal judiciary, in fact, is one of the best and purest of American institutions. Its members are nominated by the President with the consent of the Senate, and their term of office is for life or during good behaviour. Although the remuneration of the judges of all ranks is small if measured by English practice, the great dignity and high social consideration universally allowed to them renders the office attractive to the foremost men of the time. The Supreme Court is one of the best tribunals in the world, and some of its members are and have been the flower of the American intellect. In the circuit and district courts also are many men whose opinions on personal grounds alone would justly command universal respect. So constituted, the Federal judiciary has been admirably qualified for the delicate duties which have been imposed upon it of holding the balance between the rival authorities of the nation and the State, and of protecting within the State the rights of the alien and the stranger. But while the

Federal judiciary is appointed to judge the acts and measures of the Federal as well as the State authorities, it is itself peculiarly under the influence of the President and Congress. The tribunals could hardly help taking a political colour from the political parties which from time to time control the appointments, particularly when political controversy turns, as it does in America, so largely on the legal interpretation of constitutional instruments.

"The constitutional interpretations of the Supreme Court," says Mr. Wilson, "have changed slowly but none the less surely with the altered relations of power between the national parties. The Federalists were backed by a Federal judiciary; the period of Democratic supremacy witnessed the triumph of Democratic principles in the courts; and Republican predominance has driven from the highest tribunal all but one representative of Democratic doctrines. It has been only during comparatively short periods of transition, when public opinion was passing over from one political creed to another, that the decisions of the Federal judiciary have been distinctly opposed to the principles of the ruling political party." We have already noticed the dependence of the subordinate courts on congressional legislation, and their consequent liability to alteration or extinction at the caprice of Congress. Not less significant is the power of Congress to dilute the Supreme Court itself by creating new judges. "In December 1869 the Supreme Court decided against the constitutionality of Congress's pet Legal Tender Acts; and on the following March a vacancy on the bench opportunely occurring, and a new justiceship having been created to meet the emergency, the Senate gave the President to understand that no nomination unfavourable to the debated Acts

would be confirmed. Two justices of the predominant party's way of thinking were appointed; the hostile majority of the court was outvoted, and the obnoxious decision reversed."

The State courts, as a rule, want many of the elements which go to constitute the strength of the Federal judiciary. There is some variety in the practice of the States, both as to the mode of appointing the judges and as to the duration of their term of office; but it will be seen from the following statement that the tendency, on the whole, is to short tenures and popular elections. The matter is wholly within the power of the people themselves, and is, to a large extent, regulated by provisions in the State Constitution. Four Constitutions require all judges to be elected by the people in their respective districts; one gives the election to the Legislature; one to the Governor, and three to the Governor and Council. Taking the two highest orders of courts—those classified by Mr. Stimson as supreme courts and superior courts respectively—we find that the judges of the former are, in a large number of cases, elected by the people of the State; in others, by the electors in their respective judicial districts; in four, by the two Houses of the Legislature in joint committee, while in a few others they are appointed by the Governor and confirmed by the Legislature or the Senate. The judges of the superior courts, which occupy much the same position as the High Court of Justice in England, are, in a large majority of States,

elected by the people of the State in their respective judicial districts, circuits, or counties; in several by the Legislature; in two or three they are appointed by the Governor subject to confirmation by the Senate. Supreme Court judges in Vermont hold office for two years only; in a considerable number of States for six years; in one for five years, and in others for terms of seven, eight, nine, ten, twelve, fourteen, and in three States during life or good behaviour. There is a like variety of terms in the superior courts, one of the most common being the term of four years. Justices of the peace, who exercise a limited jurisdiction in civil and criminal cases of minor importance, are in all but a few States elected directly by the people of the districts in which they act, and their term of office in the majority of States is limited to two or four years, although three, five, six, seven, and even fifteen years' terms are fixed in some cases.

Popular elections and limited tenures are not, for obvious reasons, generally regarded as conducive to the excellence of a judicial system; and in most of the State courts the salaries paid to the judges are below what we should consider to be essential in similar cases. The inferiority of the State courts in general to the Federal courts is not to be denied. They do not offer the same inducements to able men, nor do the judges speak with the same consciousness of assured position. The ablest lawyers in a country where legal practice often produces enormous emolu-

ments are not likely to be attracted by the very modest advantages of a seat on the judicial bench. In many States it would doubtless be found that the bench is often regarded as a stepping-stone to the bar: a young judge elected through a party vote may hope by an efficient discharge of his duties to recommend himself to clients when he returns to private practice. A popular election generally, though not necessarily, means a party vote, and judges thus elected must be expected to be more avowedly subservient to party than those who are nominated by Legislatures and appointed by executives, although these in turn depend on party elections. But while the popular election of judicial officers may be open to all these and many other objections, it commends itself to the people by the hold which it gives them over their own courts. Scientific justice may fare badly under such a system, but public opinion, in any case which calls for its intervention, is likely to have a powerful influence on the bench. Accordingly, the constitutional movement throughout the States has in recent times been steadily in the direction of popular elections. In 1830 in one half of the States the judges were appointed by the Governor; in the other half they were either appointed by the Governor subject to confirmation by the Legislature, or elected by the Legislature itself.* In half a century, therefore, the constitutional practice of the States on this important head has been revolutionised.

* Ford's "Citizen's Manual," p. 136.

It is evident from this review of the relations of the National to the State Governments that the field of action denoted by the phrase—so familiar in our own controversies—"law and order" is for the most part reserved to the latter. The National courts can only deal with crimes which are declared to be such by competent legislation in Congress. The State courts have an inherent jurisdiction to punish crimes which are such by the principles of the common law, unless where the State Constitution has imposed restrictions. But there is no common law of the United States.* In the matter of suppressing public disorder, the National Government, it is said, has no right of its own to interfere except in two cases—where the property of the National Government itself is in danger, or where riotous resistance is offered to an Act of Congress with a penalty attached.† And while Congress may provide

* So declared by the Supreme Court in the case of the United States *v.* Corlesp, Wherlon, 415.

† Mr. FitzJohn Porter in the *North American Review*, vol. cxli. p. 353. Mr. Porter gives the following illustration of the limited functions of the National Government. "During the late Rebellion a draft became necessary to fill up the army of the Union. The President, in pursuance of an Act of Congress, had ordered it, but the draft could not be made under the immediate direction of the general Government: it must be made under the supervision of the State authorities. The draft . . . . was resisted, and from one step to another the resistance culminated in a riot, one of the most disgraceful ever known in this country. Houses were pillaged, orphan asylums were burned, innocent men were hung to lamp-posts, and for days in this great city scenes of anarchy and bloodshed were enacted, at the mention of which to-day every citizen of this great metropolis should

for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions, the militia itself is a State force until it is actually called into service for the Union, and the appointment of officers is reserved to the State. "Bodies of militia called into the service of the United States are subject not only to the orders of the President as commander-in-chief, but also to those of any officer outranking their own who may, under the authority of the commander-in-chief, be placed over them."*

In the course of the controversy about Home Rule in Ireland, it is sometimes assumed that one of its essential features is an Irish Executive proceeding from and dependent upon an Irish Parliament. Whether, granting that there is to be an Irish Executive, it ought to depend for its existence on the support of a parliamentary majority, is a very large question, and one that has never yet been subjected to discussion. The proposal has been taken for granted, rather than established by argument, and it is a not unnatural inference from our own parliamentary practice. But the essential difference between the Imperial Parliament and the proposed Irish Legislature has been overlooked by those who

shudder with horror. But the United States Government had no right to interfere, although the draft was for its benefit, to replenish its armies fighting for the restoration of the Union. The draft was made under the immediate direction of the State. No officer of the Government, from the President down, could act except when called upon by the State authorities."

* Cooley's "Constitutional Principles," p. 89.

assert the principle as too obviously just to be discussed. The Imperial Parliament is omnipotent, and all powers and authorities depend upon its will—the Executive among the rest. We cannot choose but make the Executive dependent upon a parliamentary majority so long as the present theory of the Constitution holds good. Whether we should, without any such necessity, import the same principle into a system of subordinate legislatures is a question which we have no intention of discussing here, beyond pointing out that the risk of unstable administrations and frequent general elections is not one to be undertaken lightly or without cause. It will be sufficient to direct attention to the palpable fact that the practice of the United States is established on the opposite principle. Home Rule, according to the American plan, would certainly mean both an Irish Parliament and an Irish Executive, but not an Executive dependent on and proceeding from Parliament. All the Parliaments of the United States are statutory, limited, and in a sense subordinate, but not one of them has an Executive dependent upon it. Congress, as we have seen, has acquired a certain and considerable measure of control over the actions of the Executive, but the Executive is not dependent on Congress in the sense in which the phrase is used amongst ourselves. Still less is the State Executive dependent on the State Legislature. Least of all is the Territorial Executive, resting as it does on Federal authority, dependent on the Territorial Legislature.

THE VETO.—Another issue of the second order of importance in the Home Rule controversy is one on which American practice may be appealed to with some advantage. The Home Rule Bill, it will be remembered, gave to the Lord-Lieutenant a veto on the measures passed by the Irish legislative body. The question was frequently asked, Is this to be a real or a sham veto? It was said there are vetoes and vetoes. The British constitution offers instances of vetoes which are rarely acted on, or never acted on at all. The most conspicuous example is the veto of the Crown on bills which have passed both Houses of Parliament. According to the now current theories of the Constitution, the veto of the Crown is a fiction.* It is nearly two hundred years since it was last exercised. Was the veto of the Lord-Lieutenant intended to be a counterpart of the veto of the Crown? The question, and indeed some of the answers to it, were based to some extent on a misconception of the present system. The veto of the Crown is inoperative only because the House of Commons has possessed itself of it, and the House of Commons has no occasion to exercise the veto upon itself. It is conceivable, indeed, that after a bill had passed both Lords and

* "The necessity of refusing the royal assent is removed by the strict observance of the constitutional principle that the Crown has no will but that of its Ministers, who only continue to serve in that capacity as long as they retain the confidence of Parliament. This power was last exercised in 1707, when Queen Anne refused her assent to a bill for settling the militia of Scotland."—*May's Parliamentary Practice.*

Commons, some sudden change in sentiment, or some sudden revelation of circumstances unknown to the House when it consented to the passing of the bill, might call for the refusal of the royal assent; and if the Ministry authorised the refusal, it would do so under the same conditions that apply to all its public acts. The House of Commons has virtually made itself omnipotent, and the Ministry, which alone could wield the veto, is its instrument. It does not follow that a veto expressly intrusted to another of its instruments, the Lord-Lieutenant, on the measures of a subordinate and limited Legislature should be equally dormant. Whether it would be exercised often, or at all, is a question that would depend entirely on the good sense and good feeling of the Irish legislative body and the British Government. So far as American examples go, they show that the veto, under which all the Legislatures are laid, is anything but a sham. Alike in Federal and State Governments, the President or Governor disallows bills of which he disapproves. In some cases, where a bill appears to be unconstitutional, the head of the State deems it to be his duty to refuse his assent, in order to avoid the expensive and dilatory proceedings which might follow if that question had to be tested in a court of law. The writer has known cases in which a Governor has heard counsel for parties interested in the question whether a particular bill, not a private bill, should be allowed to pass. Only the other day, the President of the United States exercised his power in a most striking

and effectual manner, by refusing his assent to a Pension Bill in support of which very formidable political forces had been arrayed. The case is remarkable from the fact that whereas the bill had been originally passed by a two-thirds majority in each House, when it was sent back for reconsideration to the House of Representatives, the requisite majority to pass it over the President's veto was not obtained. The veto is, in fact, an essential feature of the American system, and it is neither ineffective nor unduly obstructive. The peculiar conditions under which it is applied must not, however, be forgotten. The officer who exercises this power is equally with the Legislature the nominee of the people. His veto is not an external veto, as that of the Lord-Lieutenant would be. The same electors are the source of authority to the Legislature and the officer having the power of veto. The exercise of that power is thus certain to be strengthened by his equal claim to represent the opinion of the people, and certain to be moderated by the corresponding authority of the Legislature. And in most cases the veto of the executive officer may be overcome by the two-thirds vote of both Houses. The critics of the Irish Home Rule Bill demanded, rather unreasonably, that the exercise of the Lord-Lieutenant's veto should be regulated beforehand. If prescribed conditions could have such an effect, this condition might be worthy of some attention. An executive officer might be the more readily disposed to give effect to his own views about

a bill submitted to him by the Legislature if he knew beforehand that his action would not necessarily thwart the deliberate second thoughts of two-thirds of the representatives of the people.

The practice of the States with regard to the veto power is almost uniform. In all but four States (Rhode Island, Ohio, Delaware, and North Carolina), and in all the Territories, a bill passed by the Legislature must be sent to the Governor before it becomes law. He may veto it by returning it to the House in which it originated, with a statement of his objections. In Connecticut, an ordinary majority vote in each House will suffice to carry the bill over the Governor's veto; but generally a proportional majority is required. In some States two-thirds of the members present in each House must vote; in others, two-thirds of the elected members; in Nebraska and Maryland, the majority must consist of three-fifths of the elected members. If the Governor fails to return the bill within a limited time, it becomes law, unless the Legislature adjourns before the limited time has expired. Thus five, six, and ten days are the usual periods during which the Governor may exercise his discretion. Bills retained by the Governor are known as "Pocketed Bills." See Stimson's "American Statute Law," § 306.*

* "On Wednesday the 16th the President returned the bill to enable the Commissioners of Agriculture to make a special distribution of seeds in the drought-stricken counties of Texas, which provided for an appropriation of $10,000 for that purpose. 'I can find no warrant in the Constitution,' the President wrote in his message, 'and I do not believe that the power and duty

of the general Government ought to be extended to the relief of individual suffering which is in no manner properly related to the public service or benefit. A prevalent tendency to disregard the limited mission of this power and duty should, I think, be steadfastly resisted, to the end that the lesson should be constantly enforced that, though the people support the Government, the Government should not support the people.'"—*New York Nation*, February 24, 1887.

CHAPTER IV.

THE TERRITORIES.

THE Territories of the United States, eight in number, form an example of delegated self-government, as opposed to the independent and semi-sovereign self-government of the States themselves. Externally there is no striking difference between the organisation of the State and that of a Territory, and the one probably enjoys about as much local freedom as the other in the management of its own affairs. In relation to the Federal Government, however, the Territories are merely the domain of the United States, with which Congress may deal as it pleases. Its inhabitants have no part in the constitution of the National Government, and they have no representation in either House of Congress.

The legal status of the Territories rests primarily upon Article iv. section 3, paragraph 2, of the Federal Constitution: "The Congress shall have power to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims

of the United States or of any particular State." Under these powers Congress has from time to time created Governments for the various Territories, generally with plenary legislative power either in the Governor and judges, a Territorial Council, or a Territorial Legislature chosen by the people, subject, however, to the approval of Congress.

The existing general legislation of Congress on Territorial Governments may be summarised as follows. The reference is to the Revised Statutes of the United States, 1878.

Sect. 1841.—The executive power is vested in a Governor holding office for four years, unless removed by the President.

Sect. 1842.—The Governor can veto any bill passed by the Legislative Assembly; but his veto may be overridden by a two-thirds majority of both Houses, except in Utah and Arizona.

Sect. 1846.—The Legislative Assembly consists of a Council and House of Representatives, both elective.

Sect. 1851.—The legislative power of each Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed on the property of the United States; nor shall the lands or other property of non-residents be taxed at a higher rate than the lands or other property of residents.

Sect. 1849.—All laws passed by the Legislative Assembly and Governor of any Territory, except in any of the Territories of Colorado,* Dakota, Idaho, Montana, and Wyoming, shall be submitted to Congress, and if disapproved shall be null and of no effect.

* Now a State.

Sect. 1891.—The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organised Territories, and in every Territory hereafter organised, as elsewhere within the United States.

Sect. 1889.—The Legislative Assemblies of the several Territories shall not grant private charters or especial privileges, but they may by general incorporation Acts permit persons to associate themselves together as bodies corporate for mining, manufacturing, and other industrial pursuits, or the construction and operation of railroads, waggon roads, irrigating ditches, and the colonisation and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any benevolent, charitable, or scientific associations.

Sec. 1890.—Religious or charitable corporations are not to hold real property to a greater extent than $50,000; but vested rights are not to be impaired.

The view taken by the Federal Courts of the relations of Congress to the Territories is set forth in a recent case, in which an Act of the Territory of Dakota in 1871 had been disapproved and annulled by an Act of Congress, 27th May 1872, except for certain purposes.* Chief-Justice Waite said: "In the organic Act of Dakota Territory there was not an express reservation of power in Congress to amend the Acts of the Territorial Legislature, nor was it necessary. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the Territorial Legislature, but it may itself legislate directly for the local Government. It may make a void Act of the Territorial Legislature valid, and a valid Act void. In other words, it has full and complete legislative authority

* National Bank *v.* County of Yanktown, 101 United States Supreme Court Reports.

over the people of the Territories, and all the departments of the Territorial Governments. It may do for the Territories what the people under the Constitution of the United States may do for the States."

We have adverted to the proprietary character of the control given to Congress over the Territories by the Constitution. It appears to have been argued at one time that this control was to be regarded as confined to the property, and did not extend to the institution of local Governments for the people residing thereon. On the other hand, there is no express limitation of the power; but "it is believed," says Mr. Cooley, "that the general restrictions of the Constitution in favour of life, liberty, and property apply to all the legislation of Congress, including the laws which it may make or permit to be made for the Territories."

While the Territories are not directly represented in Congress, they are entitled to send delegates to the House of Representatives, who may take part in the discussion of affairs and present bills for the consideration of the House, but who have no vote. This right, of course, is created by congressional legislation.

The Territorial system, it will be seen, attempts to embrace two elements, which many politicians pronounce to be incompatible—the practical self-government of the dependent community, and the effective supremacy of the central Government. The grant of legislative power is certainly sweeping enough, extending as it does to all "rightful subjects of legislation," and a glance at a Territorial statute book will

show how freely it is exercised. The case of Utah shows that Congress has no hesitation in legislating according to its own principles, and against the opinion of a large portion of the community where issues sufficiently important are at stake. Nor does it confine its interference to cases in which it disapproves or distrusts the action of the local Legislature. The Congress just ended, for example, has passed an Act prohibiting to aliens the acquisition of land in the Territories—a measure which is doubtless in harmony with prevailing public opinion.

It must never be forgotten, however, in considering Territorial Home Rule, that it is confessedly a state of probation. It is a temporary system, the natural end of which is the admission of the Territory into full fellowship with the Union as a State. To accelerate that end is the ambition of all Territories. Disabilities that might become intolerable if they were supposed to be permanent are easily borne when their termination is only, as it is in most Territories, a question of time. Even as it is, American constitutional writers have some difficulty in reconciling the dependence of the Territories on a Congress in which they are not represented by voting power with the principles of free government. Mr. Cooley takes refuge in the analogy of municipal institutions, which are always formed under the direction of, and within the limits prescribed by, the State.

The courts being, like all the other institutions of a Territory, the creation of Congress, occupy a position

of their own, which is not the same as that of either the National or the State judicature. They exercise the customary jurisdiction of both State and Federal courts, but the practice, pleadings, and forms of procedure are left to be regulated by the Territorial Legislatures.*

* Cooley's "Constitutional Principles," p. 137.

CHAPTER V.

CONCLUSION.

THE most obvious conclusion to be drawn from a survey of American institutions is, that under them the problem of Home Rule has, on the whole, been satisfactorily solved. Whatever may be the defects of the system, it has at all events succeeded in drawing a line of demarcation between the respective provinces of the nation and the State, and in keeping each authority within its own bounds. Although political parties are based in some measure upon the rivalry of State and nation—one seeking to magnify, and the other to minimise the sphere of the Central Government—there is now a practically universal acceptance of the essential features of the present system. It is this fact which gives significance to the wide-spread American sympathy with the Home Rule movement in this country. It would be an entire mistake to suppose that such sympathy is confined to persons of Irish descent and politicians desirous of conciliating the Irish vote. The average American citizen feels that his country has been built up on a system of Home Rule, and he sympathises with the Irish movement because he be-

lieves it to be an approximation to his own institutions. This feeling, coupled with the remarkably keen and intelligent interest of Americans in British affairs, counts for as much in their adherence to Home Rule as mere sympathy, personal or political, with Irish nationalism. At the same time, American sympathy is liable to be misunderstood in this country in another way. It contemplates a strictly limited Home Rule, after the American fashion, and is not based on knowledge or approval of any particular scheme which has been adopted in this country.

The ingenuity with which the rival principles of national and State control have been reconciled throughout the framework of the Constitution is also remarkable. No Constitution has ever relied so openly and deliberately on what is called the theory of "checks and balances." The older American publicists exulted in their enumeration—

"First, the States are balanced against the General Government. Second, the House of Representatives is balanced against the Senate, and the Senate against the House. Third, the Executive Authority is, in some degree, balanced against the Legislature. Fourth, the judiciary is balanced against the Legislature, the Executive, and the State Governments. Fifth, the Senate is balanced against the President in all appointments to office and in all treaties. Sixth, the people hold in their hands the balance against their own representatives by periodical elections. Seventh, the Legislatures of the several States are balanced against the Senate by biennial elections. Eighth, the electors are balanced

against the people in the choice of President and Vice-President." *

Notwithstanding all this elaboration of reciprocal checks and interlocking vetoes, the National Government has steadily extended its influence as against the State Governments. The State Governments, notwithstanding that they retain the powers not expressly disposed of otherwise, have exhibited no principle of growth. The National Government, of which the powers are enumerated, has steadily grown. The result suggests some reflections on the futility of a discussion with which we in this country are familiar, whether the status of a subordinate Parliament should be limited by the definition of the powers that are granted, or by the definition of those that are withheld. In the American Constitution it is the Parliament of express limitations that has waxed strong; the Parliament of indefinite powers that has by comparison grown weak. The same conclusion is suggested by the fact that, in the Territorial Governments the grant of power is indefinite, while the sphere of attempted action has shown no tendency to expand. As between the State and the nation the whole secret lies in the possession by the latter of the last word in any possible controversy about the extent of its powers. The "implied powers" of the Constitution have in the hands of the National Courts proved adequate to establishing the supremacy of the National

* Letter of John Adam to John Taylor, quoted by Cooley, Const. Prin., 141.

Government, the moral justification of which is the slowly but surely established predominance of national feeling. The practical issue has been to "bring home to every man's door the Federal Government as no less than his own State Government his immediate over-lord. That is not a foreign, but a familiar and domestic government, whose officer is your next-door neighbour, whose representative you deal with every day at the post-office and the custom-house, whose courts sit in your own State, and send their own marshals into your own county to arrest your own fellow-townsmen, or to call you yourself by writ to their witness-stands." *

While the National Government as a whole has thus established itself as against the States, the Parliamentary portion of it—Congress—has asserted and maintained its own predominance as against the executive and the judiciary, so that its position in the State system has been likened to that of the House of Commons in our own.

But neither as between Congress and the co-ordinate powers, nor as between the National and the State Governments, has the original framework of the Constitution disappeared. While the relative share of each of the elements has proved to be different from the expectations of the founders of the system, not one of them has grown out of the character of its original conception. The House of Commons is wholly transformed from its earlier exemplars, but Congress, how-

* Wilson's "Congressional Government," p. 26.

ever widely its sphere has been extended, still remains a body of limited powers, and the State Legislatures, notwithstanding the restrictions devised by the Federal courts, still remain the source of all the ordinary law governing the elementary relations of life and securing the maintenance of social order.

The balance between the two powers is maintained chiefly by the action of the Federal judiciary. No such intervention is possible when supreme power is vested, as it is with us, in the Central Government, or rather no judicial authority can be set up to pass judgment on the decrees of the supreme Parliament. To that extent the American practice has no instruction for us; but on the broad question of enforcing the restrictions imposed on a limited Legislature, the American practice is a powerful argument for the use of judicial machinery.

As to the relation between the Executive and the Legislature, the American example is throughout in favour of the independence of the former. Both in State and nation the government is carried on by a Legislature and an Executive which is neither dependent on, nor responsible to, the Legislature. But while the American practice on this point is a useful reminder that there is no necessity under a Government of limited powers for the Executive being dependent on the Legislature, it is full of warning against the possible dangers of executive independence. Both in State and nation the chief complaint is of the dissipation of official responsibility; and the evil is greater in the States than

in the National Government, and is greatest in those which have most generally adopted the practice of direct popular election to official posts. In some States every officer of importance is chosen by a popular vote, and every officer so chosen is of course responsible only to his electors. The State treasurer or secretary, or other officer, not only has no relations with the Legislature, but has no responsible relations with his own superiors in office. Legislatures meeting for short and fixed periods, which can neither be accelerated nor delayed, are not well fitted for that never-ceasing control of the Executive which is the main element in Parliamentary government; and, so far as one sees, there is no demand in the United States for this sort of Parliamentary control. But the opposite extreme, in which there is no control at all, not even by the elected head of the Executive, is the subject of much complaint.

Again, it is obvious from what has been said in previous pages, that not only in its control over the Executive, but even in its own proper business of law-making, the Legislature, and especially the State Legislature, is far from being intrusted with a full measure of power. Nothing is more remarkable than the extent to which great subjects of legislation are, whether by local or national restrictions, withdrawn from the consideration of the Legislatures altogether.

If any justification were needed for this attitude of jealousy and distrust on the part of the people, it would be found in the legislative methods which have

somehow established themselves. Despotism and secrecy mark the ways of the Chambers, and add to the facilities for heedless and for unscrupulous legislation.

On the other hand, the limitation of legislative capacity, the reservation of some subjects for the people themselves, and the exclusion of others from the sphere of legislation altogether, result in a certain paralysis of the public will. In the dual system of the United States—each man living under two governments, neither of which is absolutely supreme—some loss of promptitude in governmental action is unavoidable; but it has been greatly increased by restrictions superimposed on the Governments without any necessity arising from the essential nature of the system. There cannot be such an instantaneous response of the powers of Government to the mood of the people as there may be under the British system, which limits the omnipotence of its Parliament only by the possibility that it may at any moment be brought to a summary end.

This account of the legal and constitutional system of the United States might, particularly with reference to its main object, be usefully supplemented by some notice of the political methods observed in its administration. Legal institutions cover only part of the political life of a nation: a large part of it is ordered by principles and habits which have no legal basis. To one or two of these a brief reference may here be made.

PARTY METHODS.—The most important of all are the methods of party management. These have been so highly organised and elaborated and so universally followed, that they might be described with as much precision as the details of the constitutional system. In some few cases the law or the Constitution takes notice of the existence of parties, but as a rule they and their ordinances are wholly conventional. We have already noticed the solidarity of party as one of the forces making for union in the American system. In every State the people are massed into two great bodies, one of which leans to the side of Federal authority, the other to that of State-rights; but in no State or group of States is there now a party which stands for the particular local interests against the main body of the States. Both parties are organised on a theoretically popular basis. The Republican or Democratic electors of a given precinct meet in "primary meeting" to nominate candidates for the public offices of that precinct, and also delegates to a Convention which will represent the electors of the next wider area—say, the county. The county committee thus constituted will nominate candidates for the county public offices, and delegates to a still higher Convention, which shall represent the whole electors of the State. That State Convention will in like manner nominate the candidates for State offices, and, when occasion requires, delegates to the great national Convention which assembles to choose the party candidates for the offices of President and Vice-

President of the United States, and to formulate the creed of the party on the pressing questions of the day. The choice of each of these Conventions determines the regular candidate who will be voted for by the faithful members of the party. So many offices have to be filled up by election, that it is generally found convenient to have all the elections on one day—that is to say, in any given precinct an elector will vote for candidates to fill up city, county, State, and national offices in one election. The names of the party candidates are printed on one paper or ticket, and the "regular" vote is that which adopts the whole ticket as it stands.

No system, it might seem, could be better calculated to place the control of a party in the hands of a real majority than this. The representation of a given area in the Convention for the area next above it is proportional, and the prevailing rule in each circle is the rule of the majority. Yet it is this very system, copying as it does the State organisation at every point, which has brought American politics under the control of the "bosses" and the professional politicians, and which is alleged to have driven the best class of Americans out of public life. How this result has been brought about is a question which it would require the knowledge of an expert to answer. One or two of the admitted causes may be adverted to. One undoubtedly is the power of money. So vast and complicated a machine cannot be worked without a large expenditure, and much of the money is obtained by "assessments"

levied on the candidates for the various offices. There is often a regular tariff for these appointments. An interesting statement was published only the other day, which professes to give the authentic figures for the City of New York.*

A candidate for the office of Mayor of New York pays from	25,000 to 30,000 dollars.
Judge of Supreme Court .	10,000 to 20,000 ,,
Registrar	15,000 to 40,000 ,,
County Clerk . . .	10,000 ,,
District Attorney . . .	5,000 ,,

In an ordinary New York election, the sum raised by the machines from the candidates for the various offices is estimated at 211,200 dols. There is no need to speculate on the effect of such a system on the character of the officials selected for the public service. Its effect on the electorate is not less deplorable. Between the men appointed by law for work in connection with elections and those appointed and paid by the machines there is in New York "a total of 45,475 who are under pay on the day of election, and are, consequently, affected by the enormous amount of money involved. At the last election about 220,000 votes were cast, and of this number 45,000 or one-fifth were receiving pay for their services."† The same authority declares that the aggregate of salaries (Federal and Municipal) dependent on the result of elections in New York alone

* See the *New York Nation* of March 3, 1887. Mr. W. M. Ivins, the City Chamberlain, is responsible for the figures.

† *New York Nation*, March 3.

is $10,000,000. It is by the manipulation of these vast sums that the "bosses" obtain control of the party organisations. The want of good election laws accounts for many of the abuses of the present system, but the excessive resort to popular election in the appointment of public officers is perhaps responsible for more. It must not be supposed, however, that even in the most unscrupulously managed organisations there is nothing but corruption. The vast majority of voters doubtless quite honestly vote with the only organisation that represents their general political convictions. Moreover, the smaller associations, on which the great machines rest, are often held together by social rather than political ties. The reader who is curious about the actual working of the party machine will find an excellent account of its operations in the city of York by Mr. Roosevelt in the *Century Magazine* for November 1886.

THE LEGAL ELEMENT IN POLITICS.—Another remarkable feature in American politics is the predominance of lawyers. This class has always played an important part in public affairs, but its influence was probably never greater than it is now. The present Cabinet consists almost entirely of lawyers, and they abound in both Houses of Congress, and in the State Legislatures. They are the leaders of the "campaign" movements and the orators at the great public meetings. The reason, no doubt, is that the lawyers constitute in the United States the great class of speech-makers. Everybody who has a turn that

way, and no special avocation otherwise, proceeds naturally to practise at the bar, frequently after having passed through a preliminary stage of teaching school or editing a newspaper. As a class, they abound in men of culture and varied ability; and, in the absence of a leisured class with an inclination for politics, they easily hold the field. The circumstances of political life also favour their influence. Political controversy, as must be apparent from what we have stated in previous chapters, has been largely of a legal character; and the existing relations of National and State Governments have been settled to a large extent by legal interpretation. Another favouring circumstance is the existence of what may almost be called a legal habit in the American mind—everybody seems to be a little of a lawyer. The wide distribution of property in land, and the simplicity of title and registration, tend to familiarise laymen with one very important department of the law. The State laws, moreover, are very generally codified, and service in the State Legislatures spreads some knowledge of the Code over a large portion of the people. Whether the predominance of the legal class in political and official life is a good thing or the reverse is a question about which opinions will differ; but it is only fair to point out that there are liberalising influences connected with the practice of the law in America which do not exist elsewhere. One is the existence of nearly fifty different legal systems, with any one of which a lawyer may be required to make himself acquainted. A comparison

of legal principles and methods becomes a necessity of practice instead of an intellectual luxury. Again, the historical connection between American and English law forces upon the American lawyer another set of liberalising conceptions, while the new developments of American life call for a certain amount of originality in the application of old principles and the invention of new methods. In short, an intelligent American lawyer can scarcely be a narrow-minded man; and no class could be better equipped by professional training for the political lead which it has now undoubtedly acquired.

DECENTRALISATION OF PUBLIC LIFE.—While the drift of American politics has been in the direction of building up the National Government at the expense of the States, there is to be observed at the same time a very decided and general dislike to the centralisation of political influence. It shows itself in the most marked manner in the selection of the seat of the central Government. The chief city is rarely allowed to be the capital. New York City is not even the capital of its own State. The small towns and cities combine to prevent the greatness of the natural "metropolis" from being magnified by the possession of the seat of the Central Government. Neither Edinburgh nor Dublin, according to American practice, would have the smallest chance of becoming a Home Rule capital. The practice is not without its inconveniences. It is not desirable that the Supreme Court or the Legislature should be rele-

gated to obscure corners where the publicity of their proceedings is apt to be impaired. But the general tendency against the accumulation of power in one centre has many obvious advantages. There is no such drafting of energy and talents and influence to one head as that which in this country impoverishes the provinces without proportionally enriching the capital. There is no provincialism in the United States. No State or city has a monopoly of any kind of social or political influence. Great names, to which the whole nation defers, may be found in any country town. Mr. Phelps, the American Minister to this country, and Mr. Edmunds, one of the leaders of the Senate and the Supreme Court, were practising lawyers in a town less than half the size of Perth, and theirs is no exceptional case. There is no question of State patriotism in this feeling for decentralisation, but it must, nevertheless, be reckoned among the protective forces which sustain American Home Rule.

INDEX.

BANKRUPTCY laws, 67, 73.
Betterment laws, 76.

COMMERCE, regulation of, by Congress, 80.
Congress, 11; powers of, 12, 13; limitations on, 13, 14; payment of members, 25; members must belong to State, 26; debate in, 28, 29; procedure, 30, 33; business in, 34; financial questions in, 45; its relations with judiciary, 90, 97.
Constitution of United States, 7, 11, 13, 14, 63, 68, 73.
Constitutions of the several States, 62, 82, 83.
Contracts, obligation of, protected by Federal Constitution, 68, 69; examples, 70; obligation of, explained, 71, 95.
Committees, system of, in Congress, 30; in State Legislatures, 57.
Cooley, Thomas M., on State powers, 65; on protection of property, 74, 75; on Territorial government, 112, 114.
Corporations, attacks on, 51; constitutional provisions regarding, 87.
Courts—*See* Judiciary.

DECENTRALISATION, tendency to, 127.
Debate, practice of, in Congress, 28, 29.
"Due process of law," meaning of, 74.

EDUCATION, provision for, in State Constitutions, 84.
Executive in relation to Legislature, 27, 102, 119; in Territories, 110.

FEDERALIST, 68.
Field, Mr. Justice, on partial State legislation, 79.
Financial questions in Congress, 45.
Fourteenth Amendment, 22, 73.

"GERRYMANDERING," 23.

HOAR, Senator, 35, 46.
Home Rule in United States and Great Britain, difference between, vi.; in United States, essential feature of, 60, 115.
Homestead laws, 72, 84.

JUDICIARY, Federal, 17, 61, 88; powers of, 90; distribution of, 91; relations of, with Congress, 90, 97; jurisdiction of, 93; transfer of causes to, from State courts, 94; will generally follow State tribunals in State law, 94; character of, 96; place of, in system, 119.
Judiciary, State, 98; mode of appointment, 98; compared with Federal, 99.
Jury, trial by, 84, 35.

"LAW and Order," 101.
Lawyers in political life, 125.
Legislatures, varieties of, 19; Federal, 11; powers of, 12, 13; limitations on, 13, 14—see *Congress;* State, 49–59; procedure in, 55; duration of session, 59; limitations on, 63, 82; compared with Parliament, 82, 87.
Legislation, local or special, forbidden, 86; no distinction between public and private, 41 *n.*
"Legal tender case," 85.
Lobbying, 41, 88.
Limitations, constitutional, on Congress, 13, 14; on State Legislatures, 63, 82.

MARSHALL, Chief-Justice, on National and State Governments, 67.
Members of Congress, payment of, 25; must belong to State represented, 26.
Militia, 102.
"Monopolies," popular feeling against, 51.

PARTIES in the United States, 8, 39, 40; methods of, 122.
Police power belongs to the State, 84.
President, the, 43, 44.
"Previous Question," the, 33.

Property, private, protection of, by Federal Constitution, 73; by State Constitutions, 85.

RELIGION, provisions regarding, in State Constitutions, 84.
Representatives, House of, 23, 28, 29. *See* Congress.
Roosevelt, Theodore, on State Legislatures, 50; on party methods, 125.

SECESSION, right of, 9.
Senate, 21, 42, 43. *See* Congress.
Speaker of the House of Representatives, 27.
State and Federal Governments, 5, 117.

TAXATION, State power of, 77; limited by restrictions of Federal Constitution, 78, 79.
Territories, 4, 16, 22, 109.
Treaties, 63, 66.

UNITED STATES, political system of, contrasted with British, 1; imitated British system, 7; Constitution of, 7.
Universities, English, constitution of, 3.

VICE-PRESIDENT, the, 11.

WILSON, WOODROW, on Committee system in Congress, 35; on internal improvements, 47.

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